Supreme Court of the United States

October Term, 1907

No. 84

THE CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY AND THE DETROIT & CLEVELAND NAVIGATION COMPANY,

Appellants,

VERSUS

THE CLEVELAND STEAMSHIP COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

IN ADMIRALTY

Brief for Appellants

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

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THE CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY AND THE DETROIT & CLEVELAND NAVIGATION COMPANY,
APPELLANTS,

vs.

THE CLEVELAND STEAMSHIP COMPANY,
APPELLEE.

BRIEF FOR APPELLANTS

STATEMENT OF CASE.

This is an appeal from the final decree of the United States District Court for the Northern District of Ohio, Eastern Division, in Admiralty, dismissing appellants' libel upon the appellee's exception thereto, on the ground that the court had not jurisdiction of the subject matter.

The entire libel is included in the certificate of jurisdictional issues (13-20), following the practice approved in *Colvin vs. Jacksonville*, 158 U. S. 456, 458, and especially in view of this court's ruling, at page 459 of that case, that it is confined in its decision of such appeals to what appears in the certificate. For this reason, and pursuant to the stipulation of all the parties (Record 21), as provided for in section 3, rule 53, of the general admiralty rules of this court, the libel is not elsewhere inserted in the record.

The libel is *in rem* against the steam propeller, Wm. E. Reis, owned by the appellee, and is based upon injuries, inflicted in navigable water, to the center pier of a swing or draw-bridge spanning the Cuyahoga River, a navigable stream, at Cleveland, Ohio, to the protection piling work surrounding such center pier and other protection piling work surrounding one of the shore abutments of such bridge, and to a dock or wharf next below such bridge, all caused by the collisions and disaster described in the libel. The usual process *in rem* issued, the vessel was arrested and later claimed and bonded by the appellee, which subsequently filed its exception to the libel above mentioned (6). Upon the hearing the district court sustained this exception and dismissed the libel on the ground that, although "the libel sets forth a sufficient cause of action *ex delicto* against the owner of said propeller Reis, and although the property injured by said disaster, said dock, said center pier and said protection piling work, stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation." (19)

Due exception was taken to this ruling by appellants, the district court certified four separate questions relating to its jurisdiction over injury to each of the structures described, (13), and the usual steps have been taken to bring the case before this court on appeal, based upon questions of jurisdiction.

Paragraphs 1, 2, 3, 4 and 5 of the libel, (14, 15), set forth the ownership and character of the vessels involved; paragraphs 9 and 10 of the libel (15-17), describe the manner of construction and the location of the bridge pier, the protection piling work and the dock, being the property injured; and paragraphs 6, 7, 8, 11, 12 and 13 of the libel (15, 17, 18), describe the manner in which the injuries occurred.

Briefly, the case made by the libel is that the steamship Wm. E. Reis, temporarily moored at a wharf, with nearly a full cargo aboard, was negligently permitted by those in charge of her to break loose from her moorings and drift down the river into collision with the steamship John W. Moore, breaking her adrift; that the Moore thereupon drifted into collision with the steamship Eads lying next below the Moore; that all three of said vessels then drifted down the river into and partially through said railway draw-bridge; that the Moore collided with and her stern brought up against said dock, damaging the same, while the Reis, drifting between the other two vessels, forced the Eads into collision with the center pier of the draw-bridge and its protection piling work, damaging the same; and that said three vessels, thus wedged together, partially dammed the river's flow, causing the water above them to rise rapidly, and diverting and greatly increasing the current, causing it to sweep so violently under the keels of the Eads and the Reis (which lay in part in and above the draw of said bridge) that it undermined the center pier and partially carried away and injured both the protection piling work surrounding the center pier and that adjacent to the shore abutment.

The center pier of this bridge consisted of stone masonry work, resting on a cluster of piling driven into the bottom of the river at a point near the middle thereof, the stone work being partially under and partially above the water; it had upon it machinery and steam power for the opening and closing of the superstructure to permit vessels to pass through the draw of the bridge; and this pier was surrounded by a line of protection piling standing out in the channel four or five feet from it at the nearest point, the piles being driven so that they would yield and bend under the impact of a passing vessel, and having three lines of heavy timber waling fastened on their outer sides, so placed that they would act as fenders between the corrugated surface of the piling and any passing vessel. The shore abutment was of similar construction, resting on piles driven into the bottom of the river, and guarded by a continuous row of protection piling, not forming any part of the shore abutment, but driven out in the navigable channel and away from the abutment a distance of four or five feet. And this center pier and this protection piling work not only stood in, but were surrounded on every side by navigable water. The wharf or dock consisted of a heavy timber flooring, placed on a frame work of stringers and beams, supported by piles driven into the river bottom, the whole structure standing literally in this navigable river, with the waters of the river flowing

under it and alongside of it; and it was equipped with mooring piles, and built and maintained to enable vessels to moor tight alongside of it, and to load cargo from and discharge cargo upon the same.

A similar case is pending in this court, at the October term, 1907, which relates to the jurisdiction of the admiralty over damage to the superstructure, the swinging span, of a similar draw-bridge, caused by a vessel colliding with it, being the case of Duluth and Superior Bridge Company, appellant, vs. Stmr. Troy, No. 232. We believe that these two cases together embrace all of the structures permanently erected in navigable waterways, other than beacons, buoys, light-houses and breakwaters, concerning which this question of jurisdiction is likely to arise.

The Detroit and Cleveland Navigation Company was not interested in the bridge, but was joined as a co-libellant because it was a part owner of the wharf, pursuant to the practice approved in *The Commander-in-Chief*, 1 Wall. 43 at 51; *Jacobson vs. Dalles, etc., Co.*, 93 Fed. Rep. 975; *The Prinz Georg*, 19 Fed. Rep. 653.

SPECIFICATIONS OF ERROR.

The District Court erred (1) in refusing to entertain jurisdiction of the libel; (2) in holding that admiralty had no jurisdiction of the injury to the dock; (3) in holding that admiralty had no jurisdiction of the injury to the protection piling; (4) in holding that admiralty had no jurisdiction of the injury to the center pier (Record 11); and (5) in sustaining the exception to the libel upon the ground stated in its certificate of jurisdictional issues, (Record 19), that it does not appear from the allegations of the libel that any part of the injured property was either an instrument of or an aid to navigation.

ARGUMENT.

We submit three points in the argument of this appeal.

(1) Under the holdings already made by this court our case falls within admiralty jurisdiction in tort, because both the wrong and the injuries complained of were wholly consummated in navigable water.

(2) But, even if our first point be untenable, yet the constitutional grant of admiralty and maritime jurisdiction should be construed to cover the case made in this libel.

(3) Every case of physical injury to person or property, caused by the negligent act of a ship while such ship is in navigable water, should be held to fall within the jurisdiction of admiralty, regardless of the locality of the person or property so injured.

In short, we contend, upon the authority of the holdings already made by this court, that our case is one of admiralty cognizance, *ex delicto*, because *both the wrong and injuries* occurred in navigable water; that the attachment of the injured structures to the bottom soil of the river by means of piling is immaterial, so far as concerns

the jurisdiction; that it is not a requisite of the jurisdiction that the injured structure be owned by the government, or that it be an aid, or even incident or related, to navigation, though in fact each of the structures alleged in this libel to have been injured was an aid to, and clearly incident and related to navigation; that, if such be not now the result of this court's previous holdings, then the constitutional grant of admiralty jurisdiction should be now so construed; and finally, we respectfully suggest that the present rule, which treats the *locus* of the injured thing as the essential test of admiralty jurisdiction, should be reconsidered, because it is uncertain and opposed to principle and reason, its effect being to deny the jurisdiction in a large class of cases purely maritime, while it brings within the jurisdiction many cases which are in no respect maritime, and, which belong in the common law courts. We trust this last suggestion will not be considered presumptuous. We make it with the hope that, if neither of our first two points be sustained, this court will reconsider its previous holdings. We have regarded the recent case of *The Blackheath*, 195 U. S. 361, as justifying both such suggestion and such hope.

(1) UNDER THE HOLDINGS ALREADY MADE BY THIS COURT, OUR CASE FALLS WITHIN ADMIRALTY JURISDICTION IN TORT, BECAUSE BOTH THE WRONG AND THE INJURIES COMPLAINED OF WERE WHOLLY CONSUMMATED IN NAVIGABLE WATER.

While this court has in one instance expressed a dictum, unnecessary to the decision of the questions then involved, to the effect that an injury to a pier amounted to an injury inflicted on land, as we shall presently show, and has on other occasions remarked, and in some instances ruled, that there can be no maritime lien upon any permanently fixed structure such as a wharf or bridge, because it is immovable and fixed; and that, under the test of admiralty jurisdiction in matters *ex contractu*, such structures as bridges, wharves, floating dry-docks and gas beacons, are not properly subjects of maritime contracts, because they are not designed to engage in navigation, and are not subjects of salvage service, because only ships and things carried in ships are the subjects of salvage; yet we are unable to find any *holding* of this court to the effect that a physical injury to a wharf, dock, bridge-pier or protection piling work, caused by the negligent act of a ship, is not a maritime tort and within admiralty jurisdiction, provided both the thing so injured and the ship causing the injury be located in navigable water.

The leading decision of this court upon this general subject matter seems to be that of *The Plymouth*, 3 Wall., 20, where the wrong consisted in negligently permitting a vessel, moored in the navigable waters of the Chicago River, to take fire, and the flames, stretching themselves over the wharf, set on fire and damaged certain packing-houses. This court ruled in substance this and nothing more: that in cases of tort the locality in which the cause of action arose and became complete determines the jurisdiction; if this locality be the high sea or a navigable waterway, then the cause is of admiralty jurisdiction, but, if the localty be land, then the cause is of common law jurisdiction; that

the negligent act, of itself, furnishes no cause of action, being *damnum absque injuria;* that injury resulting from the negligent act must occur to consummate and make complete the cause of action; that "the whole, or at least the substantial cause of action arising out of the wrong must be complete within the locality upon which the jurisdiction depends;" and that in this case the entire damage occurred not on the water, but on the land. The view was also expressed that the feature, that the flames were emitted from a ship, did not characterize the negligent act as maritime, because it is the locality of the wrong, the fact of its having occurred on navigable water, that makes it maritime, rather than the fact that it occurred upon a ship. The court said at page 36: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high-seas or navigable waters, is of admiralty cognizance."

It is said in the brief statement of facts, at page 20 of *The Plymouth* case, that "upon the wharf large packing-houses were built," but nothing appears in any other part of the case tending to show what sort of a wharf it was. For aught that appears it may have been a solid masonry structure so thoroughly and permanently attached to and made a part of the dry land as to constitute in fact a part thereof, and we submit that it must have been of such character to act as a foundation for "the large packing-houses" described. Mr. Justice Clifford, who sat in this case, has distinguished such wharves from the kind involved in our case, in *Ex parte Easton*, 95 U. S. 68, 73, 74, where he said: "Instances may doubtless be referred to where wharves are erected as sites for stores and store houses; but the great and usual object of such erections is to advance commerce and navigation by furnishing resting places for ships, vessels and all kinds of water craft, and to facilitate their operation in loading and unloading cargo, and in receiving and landng passengers." We assume that, in describing the class of wharves designed as sites for stores and store houses, he had in mind the wharf involved in *The Plymouth* case, and other similar ones. However, the action was not to recover for injuries to the wharf, but for injuries to the buildings; and furthermore it was not claimed, or pleaded apparently, that the injury was inflicted in water. The argument on behalf of libellant conceded that the buildings were part of the land, and that it was a mixed case, where the injury occurred on land, the claim being that the tort was maritime merely because the wrong was committed on navigable water. Hence there is nothing in the case which can be construed as a ruling that such a dock as ours, consisting of a plank flooring supported underneath by a frame-work of stringers, resting on piles driven into the river bottom, and the whole structure standing literally in the navigable river, with the waters of the river always flowing under it, designed and used only as a place to moor, lade and unlade ships, instead of being the foundation for great packing houses, is land, or that a physical injury to such a dock, especially to the outer or river end thereof, cannot be said to occur in navigable water. Yet this case has been often and persistently, though erroneously, cited as authority for the proposition that any wharf or dock is land, whatever may be its location, use or form of construction.

Since *The Plymouth* case, this court has rendered several other decisions in which reference has been made to similar questions. In *Ex parte Phoenix Insurance Company*, 118 U. S. 610, a ship-owner sought to limit liability under the Federal statutes to the value of his ship, on account of injury to buildings situated on land, claimed to have been caused, as in *The Plymouth* case, by negligently permitting sparks to be emitted from the vessel's smokestack, which communicated to and set the buildings on fire. These buildings were conceded to stand upon and to be a part of the main land, and it was held that admiralty had no jurisdiction for that reason, following *The Plymouth*.

In Johnson vs. Chicago & Pacific Elevator Co., 119 U. S. 388, the jib-boom of a vessel towed by a steamtug in the Chicago River struck and penetrated the wall "of a ware-house *on the land*, in Cook County, *near the bank* of the Chicago River, which had stored in it a quantity of shelled corn." Following *The Plymouth*, Mr. Justice Blatchford said that this cause of action was not a maritime tort within admiralty jurisdiction, because the substance and consummation of the wrong took place on land. If this is to be treated as a ruling of this court, it goes one step beyond *The Plymouth* and *Ex parte Phoenix Insurance Co.*, because the wrong arose from improper navigation of the tug, and was therefore maritime, while in the other two cases the emission of sparks from the vessels did not characterize the wrong as maritime. But, so far as regards this branch of our argument, the case under discussion is entirely in line with our contention, as are the other two cases above discussed, because they recognize that, if the injured thing be in navigable water and the wrong be maritime, admiralty has jurisdiction. It was said, however, at page 364 of *The Blackheath* opinion that this statement in the case under discussion was *dictum*, and we suppose this remark was based on the fact that it was unnecessary in this *Pacific Elevator* case to determine whether the cause of action was maritime or not, because the proceeding in the state court was not a proceeding *in rem*. The facts were as follows. The owner of the elevator having secured judgment *in personam* in the state court against the tug owner, upon a bond given to release the tug from seizure under attachment, provided for by the Illinois water-craft act, the cause came before this court upon writ of error, on the claim that the proceeding was *in rem*, and therefore not within the jurisdiction of the state court because based upon a maritime tort. Had the proceeding been *in rem*, it would then have been necessary to determine whether the tort was maritime in nature; but the most cursory glance at the record showed that the action was not against the tug, that it was against Johnson, with attachment of the tug, and was therefore necessarily *in personam;* and this court held that the Illinois Statute did not provide for, and that this action was not, *in rem*, but merely a common law remedy which the common law was competent to give; hence the Statute did not contravene any provision of the Federal Constitution or of the Federal judiciary act of 1789, and it was therefore unnecessary to the decision of the case to determine whether the cause of action was maritime and of admiralty cognizance or not.

In *The Homer Ramsdell Co., vs. Comp. Gen. Trans. Co.*, 182 U. S. 406, the action was at law for damage to a pier caused by a vessel colliding with it while in charge and because of the negligent act of a pilot compulsorily accepted by the vessel, and the only questions certified to this court were: (1) whether the laws of New York imposed compulsory pilotage on a foreign vessel engaged in a certain designated voyage, and (2) whether, in an action *at common law*, a ship owner is liable for injuries inflicted exclusively by the negligence of a pilot compulsorily accepted by the ship. At page 411 it was remarked that the case was at common law, and necessarily so because it "being for damage inflicted on land, could not be in admiralty." Here again there was no contention or discussion as to the character of the pier, no claim that the injury was inflicted in navigable water, or that the pier by reason of its peculiar location and construction should not be treated as part of the land; and therefore, so far as concerns this branch of our argument, this remark is in line with our present contention, as are the other cases above discussed. But this remark, to the effect that the action was necessarily at common law and could not be in admiralty because the damage was inflicted on land, was also spoken of at page 364 of the Blackheath opinion as being *dictum*, and it clearly was unnecessary to the decision of the case, or to the determination of the fact that the action was at common law, as the second question certified stated that the action was at common law, the record showed it to be an action *in personam* at common law, and no contrary claim was made in the case.

In *The Robert W. Parsons*, 191 U. S. 17, 33, the action was in admiralty to recover *ex contractu* for repair work done upon a canal boat, while she lay in a dry-dock connected with the Erie Canal by gates, and located in an inland town of New York State. It was objected that admiralty had no jurisdiction because the contract was both made and executed on land. This objection was not sustained, it being held by a majority of the court that the dry-dock should not be treated as land, though the opposite view was expressed in a dissenting opinion. Here it was clearly necessary to determine whether or not the dry-dock should be treated as land, unless we abandon the proposition, heretofore steadily adhered to in contract cases, that a contract both made and to be performed upon land is not maritime and cannot be the subject of admiralty jurisdiction. This doctrine has been followed in the line of cases to the effect that a ship-building contract is not maritime. *Peoples Ferry Co. vs. Beers*, 20 How. 393; *Roach vs. Chapman*, 22 How. 129; and in *The Lottawanna*, 21 Wall. 558, at 592. If this dry-dock on the Erie Canal was like all others we have seen, it was constructed in an artificial basin made by excavating dry soil from the canal banks; its bottom flooring, on which the canal boat rested, was permanently attached to piling driven into the solid and unsubmerged earth; its shore end and sides consisted of solid pile and timber work permanently attached to the sides of the excavation; its canal front was provided with water-tight gates which when closed completely shut it off from the canal; and for the purpose of making the repairs all water was pumped out of the dock enclosure so as to enable the repairmen to proceed with the repairs without

being obliged to work in water. True, this was an action *ex contractu*, jurisdiction over which depended on the subject matter of the contract, rather than on locality. Notwithstanding these facts, however, it was necessary, in order to ascertain the subject matter of the contract, to determine whether the dry-dock was or was not land, and it was held that it was not.

The case last cited and that of *Cope vs. Vallette Dry-Dock Company*, 119 U. S. 625, 627, furnish instances of the occasions when this court has referred to bridges, wharves and similar structures as not being the subjects of maritime contracts. For example, in *The Robert W. Parsons*, at page 30, Mr. Justice Brown said, in discussing the question whether a canal boat is a ship or vessel: "The application of this criterion has ruled out the floating dry-dock, the floating wharf, the ferry-bridge hinged or chained to a wharf, the sailors' Bethel moored to a wharf * * * and a gas float moored as a beacon." But this remark clearly referred to the criterion by which we determine whether a floating object is a ship, namely, whether it be used, designed or capable of carrying cargo. We assume there can be no doubt that a physical injury to any of the structures mentioned by Mr. Justice Brown, caused by a ship colliding with the same, would constitute a maritime tort, if such structure was in navigable water when so injured. Such is the ruling concerning even a permanent beacon. *The Blackheath*, 195 U. S. 361.

And so of the remark made in *Cope vs. Vallette Dry-Dock Company*, supra, at 627, that "a fixed structure such as this dry-dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf, or warehouse when projected into or upon the water. * * * A ferry-bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a dry-dock." This language was used in connection with the ruling that only ships and their cargoes can be the subject matter of salvage, and no inference can arise therefrom that such structure may not be the subject of a maritime tort.

Previously then to the *Blackheath* case, this court had merely held, so far as relates to this branch of our argument, that locality is the sole test of admiralty jurisdiction in tort, that all or at least the substance and consummation of the wrong must be complete upon navigable waters, that this involves the feature that the thing injured must be in or upon navigable water; that when flames negligently emitted from a vessel on water communicate to and injure a building on land, the tort is not maritime; and that, for the purpose of applying the test of admiralty jurisdiction *ex contractu*, a dry-dock permanently built into the land adjoining the Erie canal is not to be treated as land.

It will, we assume, be contended by the appellee that the structures named in the libel should be treated as parts of the land because of their attachment to the river bottom by means of piles, and that injuries to such structures are therefore not within admiralty jurisdiction, upon the authority of a line of lower Federal court decisions, some of which so hold. We will now endeavor to analyze and dis-

cuss this line of decisions, and also consider how they are affected by the *Blackheath* decision.

LOWER COURT DECISIONS. The leading case concerning a bridge seems to be that of the *Neil Cochran*, Fed. Cas. No. 7996, where a vessel collided with the swinging draw of the L. S. & M. S. Ry. bridge, spanning the Cuyahoga River at Cleveland, Ohio. District Judge Sherman held that, as the bridge was located on land, the tort was therefore not maritime. It is matter of common knowledge and history among Cleveland people, who were familiar with that bridge, that the pier supporting its swinging span, and upon which it swung, did not stand in water at all, but was upon the main land west of the river, with a path running between it and the river's side or bank, so that the bridge, when swung open, stood above the dry land and was supported entirely by dry land, and not by the sub-soil of the river, as also appears from the statement in the opinion that the bridge was so constructed "as to swing entirely out of the way of vessels navigating said river, enabling them to pass and repass without obstruction." This fact therefore clearly distinguishes this bridge from the drawbridge described in the libel, which was entirely supported by a center pier attached to the river bed, and which was literally located in navigable water, whether open or closed.

The leading and much cited case relating to a structure standing in water and relying for its support upon the soil underlying navigable water seems to be *The Maud Webster*, Fed. Cas. 9302, where a schooner collided with a derrick erected in Long Island Sound, whereby the derrick was injured. The derrick stood in the water, resting on the bottom soil, and was used in connection with the construction of a lighthouse for the United States. It was ruled that admiralty had no jurisdiction of the cross-libel for injury sustained by the derrick, but that it did have jurisdiction over the libel based on the schooner's injuries. This case so closely resembles that of the *Blackheath*, 195 U. S. 361, that it would seem to be no longer an authority.

Following after these two leading cases, we find a line of lower court decisions holding that a wharf, dock or bridge is to be treated as land, and that a collision injury thereto is not maritime. We cite below a sufficient number of these cases to show what we think may be safely said concerning all of them, that is, that they were decided upon the theory that any bridge, wharf, or dock is necessarily land, or to be treated as land, because attached either to the shore, or to the sub-soil of a river, without any consideration of the nature of the structure, its use or purpose, or the nature of its attachment to land, whether to dry land or to the soil underlying water. *The C. Accame*, 20 Fed. Rep. 642; *The John C. Sweeney*, 55 Fed. Rep. 540; *The Mary Garrett*, 63 Fed. Rep. 1009; *The Mary Stewart*, 10 Fed. Rep. 137.

We dispute this theory. After the wood, steel and stone of which the bridge or wharf consist have been severed from the soil, they cease to be a part of the land. When they are combined into a

wharf, a bridge, a lighthouse or a beacon, the question whether they have again become part of the land is a question both of fact and law, depending in each case upon the peculiar facts established by the pleadings and proof, which deserve careful consideration, especially when the question arises in the application of our present purely arbitrary and technical test of admiralty jurisdiction in cases of tort. This question has not heretofore received careful consideration, it has in fact received no consideration, in the bridge and wharf cases we have been able to find; and has not before been presented to this court, except in relation to beacons, in the *Blackheath* case.

In all of this class of lower court decisions it has been erroneously assumed that the cases of *The Plymouth, supra*, and the *Rock Island Bridge*, 6 Wall. 213, are decisive of this theory. Turning to these earlier decisions, we find that such is not the case. In the *Plymouth*, the injury sued for was to buildings, "large packing-houses," "built upon the wharf;" but we assume this to mean either that they were built abutting upon or fronting on the wharf, as the phrase "built upon" is frequently used, or that, if they were literally upon the wharf, then, as before suggested, the wharf must have been a sufficiently solid stone or masonry foundation to adequately support such "large packing-houses," with such a solid construction and attachment to or upon the main and dry land as to make the wharf in fact a part of the land. No consideration was given to this point, as libelant's counsel conceded in argument that the buildings and wharf were land, and argued that it was a mixed case where the wrong was committed on water but the injury was inflicted upon land.

In the *Rock Island Bridge* case, the holding was simply to the effect that a maritime lien can exist only upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters, and that it therefore cannot exist upon a bridge. The court said concerning the lien: "But it cannot arise upon anything which is fixed or immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien." This clearly does not amount to a holding or suggestion that a wharf or bridge is necessarily land or a part of the land, but means merely that wharves, bridges and all kinds of real estate are fixed and immovable, and therefore not the subject of a maritime lien.

In all of these lower court cases, which have held that a bridge or wharf was land, such holding has been based upon the two Supreme Court cases last discussed, or upon the proposition that the attachment of such structures to the bottom soil of the waterway by means of piles made them part of the land. As we shall presently see, this court has recently held in the *Blackheath* case that the attachment of the foundation of a beacon, much resembling the center pier of a bridge, to the bottom soil of a waterway by piling, makes the same only technically land, and that this feature is insufficient to bar the admiralty jurisdiction. In fact, in the *Plymouth* opinion, at page 36, Mr. Justice Nelson asserted that the case of a person standing on a vessel, "*or on any other support in the river*, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and de-

stroyed," would be *a mixed case, where the wrong was done upon navigable water*, but the injury inflicted upon land.

It seems clear that the force and authority of all these lower court decisions, in so far as they hold wharves and bridges to be land because they are attached to the river bed by piles, are completely done away with by the holding in the *Blackheath* case that the attachment of a beacon and its support or foundation to the bottom soil of a water way by piling makes the same at most only technically land, and that this form of attachment is not sufficient to bar the admiralty jurisdiction.

The tendency of many of the lower court decisions, however, especially the later ones, has been to sustain the admiralty jurisdiction in those cases spoken of in the *Plymouth* as mixed cases, and the efforts of the judges in this direction have frequently led to conflicting results, based on most peculiar reasoning in some instances.

We wish to call attention to a few of these decisions which illustrate the conflicting views now entertained by many of the lower courts, that this court may appreciate the difficulty with which practitioners meet in determining when admiralty has and when it has not jurisdiction in cases of tort, and also the imperative need which exists for an authoritative ruling upon the subject.

In *The Carolina*, 30 Fed Rep. 199, Judge Charles L. Benedict entertained jurisdiction in admiralty of a case involving injuries to a longshoreman who, while standing upon the dock, was struck and injured by a hogshead, part of a vessel's cargo, swinging shoreward from the vessel, because of the breaking of a guy-rope forming part of the unloading appliances. The question of jurisdiction was not discussed, but it was distinctly objected that libelant had no maritime lien for the injury, and it was held that he had such lien. This holding necessarily involved a prior finding that the tort was maritime and within admiralty jurisdiction. It does not seem supposable that Judge Benedict overlooked the jurisdictional question.

In *The Daylesford*, 30 Fed. Rep. 623, Judge Toulmin entertained jurisdiction in admiralty over injuries caused by the slipping of a ladder, on which libellant was descending from a vessel's rail, whereby he fell to and was injured on the wharf. This was expressly held to be a maritime tort, and therefore a case where, if both libellant and the vessel were at fault, the damages would be apportioned. The character of the wharf was not considered and the question of jurisdiction was not raised.

Yet, in *The H. S. Pickands*, 42 Fed. Rep. 239, Mr. Justice Brown, then District Judge for the Eastern District of Michigan, denied the jurisdiction, where libellant was injured by falling from a ladder to a dock. The lower end of the ladder rested on the dock and was kept from slipping by a cleat on the dock against which it stood. The wrong consisted in the master of the vessel, while standing upon the vessel's deck, moving the ladder further along the dock so that its lower end was no longer secured by the cleat. It was held that admiralty had no jurisdiction, because the injuries were sustained upon the dock, on the authority of the *Plymouth*, though there was no discussion as to the character of the dock or its method of attachment to

the land or to the bottom soil of the water way. This decision was affirmed by Mr. Justice Brewer on appeal to the Circuit Court, as appears in a foot-note of the citation given above.

In *The Strabo*, 90 Fed. Rep. 1101, decided by Judge Thomas in the Eastern District of New York, and affirmed by the Circuit Court of Appeals, (Wallace, Lacomb and Shipman, Circuit J.J.), 98 Fed. Rep. 998, it appears from the District court's opinion that the exceptions to the jurisdiction contained a conceded statement of facts, as follows: "That the libellant, employed in loading a ship lying at a dock, attempted to leave the ship by means of a ladder, by reason of the master's negligence not secured to the ship's rail, whereupon the ladder fell, and the libellant was thrown to the *ground* and injured." Here again, however, the jurisdiction was sustained. The only difference we note between the facts of this case and that of the *H. S. Pickands* is that, in the latter, a cleat on the dock kept the ladder in position until the master, standing on the vessel's deck and there handling the ladder, moved it away from the cleat so that it then had nothing either on the vessel or on the dock to hold it in position; while, in the *Strabo* case, the ladder had not been fastened or held in position either on the vessel or on the dock from the time it was first put out. We do not see how this difference can distinguish the cases, as the negligent act in either case was committed aboard the vessel. The District court did not seek to distinguish the two cases, but sustained the jurisdiction upon the reasoning that the ladder was a part of the ship (though it depended upon the dock for the principal part of its support); that libellant received the first effect of the wrongful act on the ladder, therefore on the ship; that it cannot be assumed that, through nervous shock or otherwise, he received no injury until he struck the dock; and that, if it shall appear that libellant sustained any physical injury, through nervous shock or otherwise, before striking the dock, admiralty has jurisdiction, though the sum total of his injuries was not complete until he struck the dock. The Circuit Court of Appeals, (98 Fed. Rep. at page 1000) said: "In this case it is highly probable that the libellant sustained some damage from nervous shock while precipitated through the air, and before he fell upon the wharf. A person of sensitive, nervous organization would without doubt receive such injury. The injury commenced when, by the slipping of the ladder, the libellant was thrown into the air. Whether or not this throw was *damnum absque injuria* cannot be told, but it is true, as the District judge said, "that the whole wrongful agency was put in motion and took effect on the ship, and thereby the libellant was hurled from his position on the ship, and before he reached the dock was subjected to conditions inevitably resulting in physical injury, *wherever he finally struck*. The cause of action originated and the injury had commenced on the ship, *the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the string piece of the wharf or in the water.*"

The Circuit Court of Appeals sought to distinguish this case from the *H. S. Pickands, supra*, on the ground that there the wrongful act consisted in the fact that the master, while on the ship, moved

the shore end of the ladder away from the cleat on the dock, apparently considering that this placed the locality of the wrong itself on the dock; but this attempted distinction seems unwarranted, because the master stood on the ship when he so moved the ladder, hence the *locus* of the wrong was water; furthermore Judge Brown denied the jurisdiction solely upon the ground that the *locus* of the injury was decisive of the question.

For a case involving further consideration of this doctrine of the *Strabo* case, see *Lindstrom vs. International Nav. Co.*, 117 Fed. Rep. 170, 173.

In the *Albion*, 123 Fed. Rep. 189, the wrong consisted in removing the gang plank connecting the vessel to the wharf, and libellant, expecting to find such gang plank in position, on a dark night attempted to walk from the wharf on to the vessel, but, because of the absence of the gang plank, *walked overboard* and sustained personal injuries, which we infer from the statement must have been consummated in the water. This was treated as a wrong consummated upon the wharf and therefore not within the admiralty jurisdiction.

In *The City of Lincoln*, 25 Fed. Rep. 835, decided by Judge Brown in the Southern district of New York, steel blooms had been unloaded from a vessel and deposited upon a wharf or pier, and had remained there two days awaiting their removal by the consignee, when the wharf gave way, precipitating the blooms into the water, whereby some of them were lost and others damaged. The owner of the blooms libelled the vessel in admiralty, whose owner brought the wharf owner into the case as a respondent, under a practice in analogy to the 59th Admiralty Rule of this court, and the wharf owner excepted to the court's jurisdiction over him on the ground that, if he was liable for failure to maintain the pier or wharf in proper condition to receive such a cargo, his wrong was a land tort and not within admiralty jurisdiction. It was held that, while the wharfinger's wrong might be said to occur on land, the injury to the blooms was both commenced and consummated by and in water, and the jurisdiction was sustained. It will be noted that part of the blooms were lost, by sinking into their final resting place upon the soil underneath the water. At page 837, the court said that, if the goods had been crockery or glass-ware, and had been broken or otherwise injured through the breaking down of the wharf, rather than by being thrown into the water, in such case the admiralty jurisdiction would not have attached; though no consideration was given to the character of the wharf or its attachment to the shore or bottom soil of the river, to determine whether it should be treated as land. It would be interesting to know what Judge Brown's ruling would have been, if the injuries had been in part to blooms, in part to glass-ware, both owned by the same libellant, and in part to libellant or some other person, all located on the wharf when it gave way; and what would have been the ruling on appeal by the Circuit Court of Appeals for that circuit, as now composed, which affirmed the *Strabo* case, *supra*. Such a query will illustrate the uncertainties which attend the practical application of the present rule of locality.

An exactly opposite result was reached by Judge McPherson in

The Harby, 95 Fed. Rep. 170, where a vessel collided with a wharf or dock, crushing it to such an extent that certain blocks, moulds and tools located on the same were either hurled into the water by the direct impact of the ship, or else dropped into the water by the breaking in of the wharf, whereby this property was lost by sinking and could not be recovered. Objection being taken to the jurisdiction in admiralty, it was held (quite contrary to the rule in the *City of Lincoln*, so far at least as relates to the blooms which were lost and could not be recovered in that case), that the injury was consummated on the dock, because it was there that the wrongful violence occurred, and that the subsequent sinking of the property was merely *an unavoidable consequence due to the force of gravity*. And so the jurisdiction was denied. The court assigned as a further reason for this holding, though not the ruling ground thereof, that the ultimate damage was done when the property found its final resting place on the bottom soil of the river and was there lost to the libellant, saying that, though the property was then partially surrounded by water, yet "the point in space where recovery is thus obstructed, is upon the land," that is, upon the bottom soil of the river and under water. No inquiry was made in this case as to the character of the wharf or the nature of its attachment to the soil.

Other judges of the lower courts have, however, taken a different and more reasonable view concerning the soil underlying navigable water. In the *Arkansas*, 17 Fed. Rep. 383, a well reasoned case, it was said: "But suppose on the other hand the structure, whether bridge, boom, pier or lighthouse, be a lawful one; suppose it to be placed in the navigable bed of the river by lawful authority; and suppose some reckless mariner should carelessly run his vessel upon it and injure it; can it be doubted that the tort thus committed would be within the admiralty jurisdiction? Can it be doubted that in such case the owner of the structure might proceed against the owners of the boat *in personam*, or against the boat itself *in rem*? The tort itself would be a marine tort; it would be, as to place, within the admiralty jurisdiction. The owner of the structure would have a right to proceed *in rem* against the boat, because from its nature a maritime lien would attach to the boat. The owner of the structure would, in this respect, have a certain advantage over the owner of the boat, since the latter, if injured, would be restricted to the remedy *in personam*. And this is exactly as it should be, since the boat is a moving, transitory thing, and, if no maritime lien attached to it and no remedy existed in admiralty to enforce the lien, the boat might take its departure into distant places or foreign jurisdictions, leaving the owner of the structure without any effectual remedy. Indeed the admiralty jurisdiction owes its existence chiefly to the fact that the common law tribunals, by reason of their modes of procedure, and their doctrine that possession is indispensable to a lien upon movables, are wholly inadequate to give relief against ships and vessels afloat upon the high seas and other navigable waters of the earth. There is therefore good reason why the maritime lien and the admiralty jurisdiction should obtain in favor of the owner of a lawful structure, injured by the negligent navigation of a colliding vessel. The common

law could give him no adequate relief. But this reason does not apply reciprocally in favor of the owner of the vessel as against the solid structure, which cannot move off and leave the owner of the vessel without remedy. Hence there is no necessity for establishing a lien upon such a structure, or enforcing the plaintiff's claim by a proceeding *in rem*. And, since it is settled beyond question by the *Atlee* and *Towboat* cases (*Atlee vs. Packet Co.*, 21 Wall 389; *Railroad Co., vs. Steam Towboat Company*, 23 How. 209), that the owners of the boat would have a right to proceed *in personam*, in admiralty, against the owners of the structure, *why should the reciprocal right of the owners of the structure to a remedy in admiralty against the boat be denied?*" This opinion was expressed after a careful consideration of, and in the endeavor to be guided by the earlier decisions of this court; but in opposition to the lower court decisions which had denied admiralty jurisdiction over injuries to wharves and bridges caused by vessels colliding with them. We quote at length from this case because it so clearly expresses the views we entertain.

In the *F. & P. M.*, No. 2, 33 Fed. Rep. 511, 514, Judge Dyer of the Wisconsin District, after stating the substance of the language we have quoted above from the *Arkansas* case, expressed his approval thereof, and said he had no doubt that such was the law.

And this court, citing the two cases just above considered, at page 365 of the *Blackheath* case, has apparently expressed the same view concerning the effect of attachment of a structure to the subsoil of navigable water, saying: "And again it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the considerations that the injured thing was an insrument of navigation and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea."

In this state of the authorities this court decided the case of *The Blackheath*, 195 U. S. 361, which to us seems all-sufficient authority for sustaining the jurisdiction in the case at bar. This decision clearly recognizes that the beacon was attached to the soil underlying the waterway, that it therefore formed a part of such soil by the ordinary criteria of the common law, but held that this attachment made the structure only technically land, and did not bar the admiralty jurisdiction. We assume that the ruling grounds of this decision were (a) that a ship, navigating in a public navigable waterway, negligently collided with and (b) injured a structure located partially in and partially above such water-way; and (c) that the attachment of such structure to the bottom soil underlying the water by means of piles did not operate to divest the tort of its maritime character. And we assume that the incident facts that the beacon was an aid to navigation, and owned by the Government, were not intended to be treated as tests of the jurisdiction, or at least not as essential tests, but that they were mentioned because they were facts in the case then before the Court.

GOVERNMENT OWNERSHIP. We have searched the books with considerable industry, but have been unable to find any authority supporting the proposition that a constitutional grant of jurisdiction

is to be construed more broadly in favor of the government to which it is made than in favor of private individuals, or that it is to be construed as including a certain class of injuries to the property of the government, but not the same class of injuries to the same sort of property owned by the subjects of such government. The remark of Lord Coke, 4 Inst. 148, 149, referred to on page 366 of the *Blackheath* opinion, to the effect that "of latter times by the letters patents granted to the Lord Admirall, he hath power to erect beacons, seamarks and signs for the sea," clearly describes one of the executive and administrative prerogatives possessed by the English Admiral, as distinguished from the judicial power granted to or exercised by either the Admiral or the English admiralty courts of that period. Benedict's Admiralty, §§33, 39. We suggest it would not necessarily follow from the fact that the Admiral had power to erect and maintain beacons, that the admiralty courts had jurisdiction over injuries to such beacons; and that the jurisdiction of admiralty over such beacons arises from the fact of their location in the waters subject to admiralty jurisdiction, rather than from the fact that the English Admiral once had power to erect beacons, or from the fact that our Congress as well as the Executive branch of our Federal government has similar power. We have found nothing, either in the grants of power to the English Admiral or to the English admiralty courts, or in the cases showing the jurisdiction actually exercised at different periods, to sanction the theory that the English admiralty has at any time claimed or exercised jurisdiction over negligent injuries to beacons or other property owned or maintained by the English Government, which it was powerless to exercise over such injuries to similar property owned or maintained by any subject of Great Britain. And we find no evidence of such discrimination in this country. Such decisions of this court as we find on this general subject concur to the effect that, when the United States government voluntarily enters its appearance before any court, either to prosecute or defend a civil claim, its status and rights as well as its remedies are identically the same as those of private individuals, and we know of no contrary authority. *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *U. S. vs. The Cornell Steamboat Company*, 202 U. S. 184. And we find no sanction either in precedent or principle for the proposition that, in case of collision injury to a beacon, or other similarly supported structure, standing in navigable water and permanently attached to the sub-soil thereof by means of a stone or pile foundation, such manner of attachment to the sub-soil under water makes the structure land, if it be owned and maintained by a private individual, but only technically land if the structure be owned and maintained by the government, unless such sanction be found in the *Blackheath* decision, which decision we do not so construe.

AIDS TO NAVIGATION. Neither can we believe, unless this court expressly so rules, that a new qualification is to be added to the rule of the *Plymouth* case, so altering that rule that, not only must the thing injured be located in or on navigable water, but that it must also be an aid to or instrument of navigation, in order that collision injury

thereto shall constitute a maritime tort. We have not so construed the *Blackheath* decision, but in the case at bar the District court sustained the exception to the libel, as appears at page 19 of the record "on the ground that, although the property injured by said disaster, said dock, said center pier and said protection piling work, stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation." It is true that the libel does not use these words in describing the structures in question, because to so do would be to plead a conclusion; but the ultimate facts pleaded show that all such structures were aids to navigation, as we shall later point out.

If the statement found on page 36 of the *Plymouth* case, that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance," and the doctrine consistently adhered to by this court for a century, that "The jurisdiction of courts of admiralty in matters of tort depends *entirely on locality*," (*Leathers vs. Blessing*, 105 U. S. at 630), are now considered too broad, because they might bring within admiralty cognizance such a tort as the chopping down of a telegraph pole in navigable water, by a man in a skiff, yet we urge that the scope of admiralty jurisdiction over physical injuries to structures located in navigable waters should not be narrowed to such extent as would result if it be ruled that, in order to fall within the same, the structure injured must be an instrument of or an aid to navigation; because such a ruling would deny the jurisdiction over cases which on principle should fall within it while sustaining such jurisdiction over cases not maritime in their nature. We submit that any case of injury to a structure standing in navigable water, caused by a ship colliding with the same, is on principle maritime, and should be within admiralty jurisdiction, because (1) it pertains to the navigation, the handling and maneuvering of a ship in motion, its prosecution and defense involve proof relating to navigation, and its right determination involves peculiar knowledge of the art of navigation, and the application of the rules of the maritime law and the statutes of the Federal government relating to shipping and navigation and to the prevention of collisions, (2) the ship is a transient thing, which may speedily depart and never return, and should therefore be impressed with a maritime lien as security for the damage it has wrought, and (3) the rights and obligations of citizens of different States or different countries are likely to be involved.

We submit that all such cases are maritime in their nature. Yet, if it be ruled that such a wrong and injury are without admiralty cognizance unless the thing injured be an aid to navigation, such ruling would be purely arbitrary, contrary to the principle and reason underlying our admiralty as a separate system of jurisprudence and jurisdiction, and would in effect over-rule many decisions of this court, which we shall presently refer to, in which admiralty jurisdiction has been sustained over injuries to persons and things which were in no sense aids to or instruments of navigation. Upon principle, it seems to us that the character of the instrumentality causing the injury does in most cases determine whether the wrong is or is not maritime, but

this point we will consider later. If, in addition to the present test, that the thing injured must be located in navigable water, some further limitation must be adopted, to prevent the jurisdiction attaching to the telegraph pole and skiff case above suggested and to similar cases, and if this limitation must relate to the thing injured, we suggest that, instead of requiring this injured thing to be an instrument of or aid to navigation, a much broader limitation should be adopted; although it seems doubtful whether any qualifying words could be adopted, to apply only to the thing injured, which would accomplish the desired purpose of denying the jurisdiction over cases not in their nature maritime, while sustaining it over actions which on principle are maritime. We assume that this must be the purpose, if a qualification of the *Plymouth* rule of locality is to be adopted.

The case at bar involves a purely maritime transaction, injury caused by a moving ship to property located in navigable water, and a clear knowledge of all the features involved in such a case requires long and patient study and such experience as an admiralty judge acquires from hearing many such cases. If it be held that a bridge pier is not an aid to or instrument of navigation, and the rule were to be so changed as to require that the thing injured must possess such characteristics, then a purely arbitrary qualification added to an already arbitrary rule would deny admiralty jurisdiction over an action which upon principle and reason is purely maritime. On the other hand, suppose a person, in no way connected with a ship or with navigation, wades or swims out to a gas buoy, anchored as an aid to navigation, in the navigable waters of a river, and wrongfully casts it adrift or scuttles it. The locality rule, so qualified, would require admiralty to assume jurisdiction of an action *in personam* for such loss, whether the buoy be publicly or privately owned and maintained. Yet, upon principle there is nothing maritime about such a case. The testimony of naval experts would not be required to elucidate the wrong, nor would the maritime knowledge and experience of an admiralty judge aid in its right determination. This would be a case peculiarly for trial before a state court judge and jury. Many similar illustrations might be given. The City of Cleveland maintains a series of water works cribs, located in the navigable waters of Lake Erie several miles from the shore, which are steel structures set upon masonry foundations, supported by a cluster of piles driven into the soil underlying the lake. And persons and corporations engaged in the fishery trade maintain elaborate systems of fishing nets and traps, fastened to piles driven into the soil at the bottom of Lake Erie, which stand in public navigable water. Neither these water works cribs nor these appurtenances of the fishery trade can be denominated instruments of or aids to navigation, or in any manner incident to navigation, except only as partial obstructions thereto; yet, if a ship navigating in the immediate vicinity of such structures be sheered off its course and into collision therewith by the suction caused by another ship passing too close to it or at too great speed, or, if a steam vessel with several barges in tow upon long hawsers, so handles its tow as to permit the wind and sea to tail one or more of its barges off into collision with such a structure, these would on principle be maritime torts, involving all the features present in the

case of collision between two vessels, so far as regards the questions of navigation and of fault; it would be peculiarly appropriate that such cases be tried before an admiralty court, and that the owner of the injured structures should have a maritime lien upon the offending ships, because the ships are transient and may speedily depart from the locality where they have inflicted such wrongs, never to return. Under a qualification that the thing injured must be an instrument of or aid to navigation, these would be causes within the exclusive cognizance of the common law, and the owners of such injured structures would be without adequate remedy, such remedy as the owner of a ship would have if it were the subject of such collision. Suppose a ship to be navigating close by fishing nets, and that a steam vessel, by one and the same fault in navigation, collides with and, by the same blow, injures both the ship and the nets in navigable waters. Is it conceivable that admiralty has cognizance of the ship's injuries, but not of those suffered by the nets, because they are not instruments of or aids to navigation? If it be answered that the state court attachment or the State water craft act would furnish an adequate remedy, we dispute this, because these common law and legislative remedies reach only such equity in the offending ship as the person operating the same, whether owner or charterer, may have, subject to all prior liens and even mortgages. Therefore we urge that, if the present rule of locality must be qualified, the qualification should not be arbitrarily attached to the thing injured; but it should be deemed sufficient if either the thing causing the injury or the thing injured be an instrument of or aid to navigation, or in some way incident or related thereto. This would not require the abandonment of any principle this court has formerly adhered to upon the subject. In fact it would harmonize with many of its former rulings, which would appear to be in conflict with the *Blackheath* decision, if the latter be so construed as to require that the injured thing must be an instrument of or aid to navigation.

The passengers carried in a ship are not instruments of or aids to navigation, nor are their personal effects or luggage. Yet actions *ex delicto* for injuries received by them in navigable waters are within the cognizance of admiralty, and the ship is impressed with a maritime lien to secure such a claim, where death does not ensue, at least. *Steamboat New World vs. King*, 16 How. 649; *The Willamette Valley*, 71 Fed. Rep. 712, 711; *Schofield vs Palmer*, 134 Fed. Rep. 753; *Quinette vs. Bisso*, 136 Fed. Rep. 825; *In re Clyde S. S. Co.*, 134 Fed. Rep. 98; *Elder Dempster Shipping Co. vs. Pouppirt*, 125 Fed. Rep. 732. A ship's cargo may consist of almost any form of personal property, iron ore, grain, mules, locomotives or street-cars. It surely cannot be said that a locomotive or street-car is an instrument of or aid to navigation upon water. Yet this court has repeatedly held that collision injury to a vessel's cargo constitutes a maritime tort. *LaTourette vs. Burton*, 1 Wall. 43; *The New York*, 175 U. S. 187; *The Beaconsfield*, 158 U. S. 303, 307. And it has been held in the lower courts that admiralty has jurisdiction of a libel against a vessel for collision damage inflicted upon a floating bath house, moored to the shore. *The M. R. Brazos*, Fed. Cas. No. 9898. The jurisdiction was objected to on the ground that the bath house was attached to the shore. Judge Choate

said: "It is clear that the libelant's bath house * * * was not a vessel constructed or used or intended to be used *as an instrument of commerce or navigation.* The test, however, of the jurisdiction of the courts of admiralty in respect to torts, is whether the place of the alleged injury was 'on the water.' * * * This structure cannot be said to have become a part of the land." It is apparent from this statement that this bath house was not an instrument of or aid to navigation. Again, a parent may maintain a libel in the admiralty for the wrongful abduction of his child, and carrying him beyond the sea. *Steele vs. Thacher,* Fed. Cas. No. 13348; *Stephens vs. Felt,* Fed. Cas. No. 13,369; yet the child had not even so much to do with navigation as would a passenger. The forcible deportation of a citizen in an American ship, pursuant to a sentence of banishment by an illegal and self-constituted body of men is a maritime tort. *The Yankee vs. Gallagher,* Fed. Cas. No. 18,124. In these cases the cause of action was maritime because the *locus* of the injured person or property was navigable water, and because the disaster was characterized as maritime through the fact that the offending instrument was a ship engaged in navigation. In another class of cases decided by this court the offending thing was not an instrument of or an aid to navigation, as in the cases above cited, but the *locus* of the injury was navigable water, and the disaster was characterized as maritime by the fact that the injured thing was a ship engaged in navigation. *In Philadelphia, W. B. R. Co. vs. Philadelphia, etc., Towboat Co.,* 23 How. 209, the cause of the injury consisted of certain piling left standing in navigable water, with which a vessel collided, to the injury of the vessel. In *Atlee vs. Packet Co.,* 21 Wall. 389, the offending thing was a stone pier in the channel of a navigable river, with which a vessel collided, the vessel being injured; and in *Panama R. R. Co. vs. Napier Shipping Co.,* 166 U. S. 280, the cause of the injury was an obstruction lying upon the bottom of a slip, which struck and pierced a vessel's bottom. In each of the cases above cited, beginning with the cases relating to injuries to passengers, either the thing injured or the thing causing the injury could not be characterized as an instrument of or an aid to navigation; in part of them the thing injured was such an instrument or aid, while in the others the thing causing the injury was such instrument or aid. It seems to have been regarded as immaterial whether such characterization applied to the one or the other, provided the disaster was maritime in nature because relating in some way to a navigating ship, and the *locus* of the injury was navigable water.

Indeed, this court has sustained the admiralty jurisdiction in a case where neither the instrument causing the injury nor the person injured could be classed as an aid to or instrument of navigation. In *Leathers vs. Blessing* 105 U. S. 626, a bale of cotton had been so negligently stowed that it fell upon and injured libellant while he stood upon a vessel's deck. The jurisdiction was objected to, among other things, for the very reason that the injury was sustained by a person not connected with the vessel or her navigation (p. 628), he merely having walked aboard the vessel at her wharf to learn whether a package he was expecting had arrived upon it; but it was ruled that the jurisdiction in matters of tort depends "entirely on locality" (p. 630); and also that "the term 'torts,' when used in reference to ad-

miralty jurisdiction, embraces not only wrongs committed by direct force, but such as are suffered in consequence of negligence or malfeasance where the remedy at common law is by an action on the case." It can hardly be said concerning this case that the ship was the offending thing rather than the bale of cotton, because there was no physical violence caused by the motion of the vessel in navigation. It had completed its voyage and was safely moored at its port of destination. At any rate, it was not an aid to navigation that was injured.

At page 365 of the *Blackheath* case, Mr Justice Holmes said, speaking for the court: "But, as has been suggested, there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was." Then what reason is there why the fact that the injured property is an aid to navigation should have more weight in determining the jurisdiction than the fact that the cause of the injury is such an aid to navigation? It seems to us that the cases above cited answer this query. We learn from them that this court has regarded it as immaterial in the past whether it be the thing injured or the thing causing the injury which is the instrument of navigation, provided one of them be such an instrument, or aid, so as to characterize the disaster as maritime, and the injury be consummated upon navigable water.

Therefore we submit that the very reasoning of the *Blackheath* case, considered in the light of this court's previous adjucations above cited, indicates that it is still regarded as immaterial whether the injured thing be an instrument of or aid to navigation, provided the cause of the injury be such instrument or aid, so as to characterize the disaster as maritime; and that the *Blackheath* opinion mentions the facts, that the beacon was an aid to navigation and that it was maintained by the government, merely because those were facts in the case before the court, and perhaps facts tending to make it more clearly aparent that the disaster was maritime than would the mere fact that the cause of the injury was an instrument of navigation; though this latter fact, together with the feature that the injury occurred on navigable water, was all-sufficient to sustain the admiralty jurisdiction.

Thus viewed, the *Blackheath* case does not conflict with the passenger, cargo and other cases above discussed in which the person or thing injured was not an instrument of or aid to navigation; and overrules only such of the lower court decisions as have held that the attachment of a structure to the bottom soil of navigable water makes the same land and thereby deprives admiralty of jurisdiction over collision injury thereto.

If, however, it be the view of this court that a structure standing in navigable water must be an aid to navigation in order that physical injury thereto caused by a vessel may be a maritime tort, yet we encounter no difficulty, as the structures mentioned in our libel are each and all of that character.

A WHARF OR DOCK is beyond question an aid to navigation, almost as much so in fact as ships themselves. This court has expressly so said. In *Allee vs. Packet Company*, 21 Wall. 389, Mr. Justice Miller, speaking for the court, concerning wharves designed for the same uses and purposes as the one mentioned in our libel, said at page 393: "These structures are also allowable in a part of the water which can be used for navigation, on the ground that they are *essential aids to navigation* itself. The navigable streams of the country would be of little value for that purpose if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyages. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect, they must reach so far into deep water as to enable the vessels used in the ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there."

Paragraph 10 of the libel (17) shows that our dock or wharf was a structure supported by piles driven into the river bottom, and that the whole structure stood in the water of the river, not upon the bank or shore, but adjoining the shore, with the waters of the river flowing underneath it; and the language of Mr. Justice Miller in the case last cited recognizes, not only that it is lawful to so build a dock out into the navigable portion of a river, because it is an aid to navigation, but also that docks or wharves "must of necessity occupy a part of the stream over which a vessel could float if they were not there."

Wharfage is a maritime contract, for the reason, as announced by this court in *Ex parte Easton*, 95 U. S. 68, at 73, 74, that "wharf accommodation is *a necessity of navigation*, and such accommodations are indispensable for ships and vessels and watercraft of every name and description, whether employed in the carrying of freight or passengers, or engaged in the fisheries. * * * Instances may doubtless be referred to where wharves are erected as sites for stores and store-houses; but the great and usual object of such erections is to advance commerce and navigation, by furnishing resting places for ships, vessels and all kinds of watercraft, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers."

This is the language of Mr. Justice Clifford, who was a member of this Court when the *Plymouth* case was decided. In saying in the case under discussion that "instances may, doubtless, be referred to where wharves are erected as sites for stores and store-houses," he doubtless referred, as we have already suggested, to the wharf considered in the *Plymouth* case and similar ones, on which it was stated that large warehouses were located. His later expression in *Ex parte Easton*, indicates a line of distinction between such a wharf as was involved in the *Plymouth* case and that general class of wharves and

docks to which the one described in our libel belongs. If a wharf or dock, of the latter class, is pronounced an aid to navigation, an instrumentality of navigation, almost as much so as ships themselves, while we are seeking to determine whether such a wharf is the subject of a maritime contract, it does not cease to be such an aid when considered as the subject of wrongful injury.

THE CENTER PIER AND ITS PROTECTION PILING WORK described in the libel were aids to navigation, we submit. If the pier, supporting as it did the swinging span of the bridge, cannot fairly be called an aid to navigation, yet the protection piling work clearly was such an aid by reason of the purposes for which it was placed there and the work it accomplished and such structures have been defined by Congress as such aids. The act of July 5th, 1884, C. 229, § 8, (3 U. S. Comp. Stat., 1901, page 3532) provides, under the heading "Obstruction to Navigation by Bridges; Construction of *Aids to Navigation*," etc.: "that whenever the Secretary of War shall have good reason to believe that any railroad or other bridge * * * over any of the navigable waters of the United States * * * is an obstruction to the free navigation of such water by reason of difficulty in passing the draw opening * * * by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, on satisfactory proof thereof, to require the company or persons owning, controlling, or operating said bridge to cause such *aids to the passage of said draw-opening* * * * to be constructed, placed, and maintained at their own cost and expense, in the form of booms, dikes, piers, or other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening * * * as shall be specified in his order in that behalf;" and further provides, that on failure of the owner to construct such aids to navigation, the Secretary of War shall cause the same to be constructed, and that the Attorney General shall institute proceedings to collect the cost thereof from such owner. As appears from the allegations of the libel found on page 16 of the record, there was a continuous line of protection piling driven into the river bottom completely surrounding the space occupied by the center pier and superstructure of the bridge when swung open, standing out in the channel four or five feet on either side from the pier and about the same distance out from the sides and ends of the superstructure when swung open; and the allegations following this description show that the purposes of this piling included the protection of all vessels passing through the draw, as well as the protection of the bridge and the guiding of vessels, especially those of extreme width, through said draw opening, safe from such injurious contact with the rough stone work of the center pier and the shore abutment as would necessarily result, but for the presence of such piling; that the wind, currents and other forces frequently cause passing vessels to come in contact with such protection work, and they would frequently collide with the stone work were the same not guarded by such protection piling; that three lines of heavy timber walling were fastened to the outer sides of this protection piling, so placed that they would act as fenders between the

piles and any vessel coming in contact with them, and that the piling was so driven that it would spring and yield under the impact of a passing vessel, thus minimizing the effect of such impact (this being the special function of spring piling); and that this protection work, and similar protection work standing out in the channel four or five feet in front of the shore abutment, were so constructed and maintained in part for the purpose of enabling passing vessels to navigate through said draw safely, and to protect them from such damage as would result from their colliding with or rubbing against the solid masonry of such pier and abutment. These allegations fairly bring this protective work within the definition of "aids to navigation" contained in the above cited Statute, and show, independently of any statutory definition, that such piling work was put there for the purpose of aiding navigation and that it accomplished this purpose.

In one sense any bridge may be deemed an obstruction rather than an aid to navigation; but, bearing in mind that the one object in qualifying the original test of admiralty jurisdiction in tort, as expressed in the *Plymouth*, is to prevent this jurisdiction from attaching in cases which are not in their nature maritime because they do not involve navigation in its true sense, we think it may be fairly said that a draw bridge spanning a navigable river is an aid to the navigation of such river. The easement to navigate a river with a ship is not superior to the easement of the public to cross the river by reasonable means, which shall not interfere with its navigation any more than is necessary, at least in the absence of legislation by Congress upon the subject. *Gilman vs. Philadelphia*, 3 Wall. 713. This court has always recognized that a bridge, especially a railroad bridge, is a means of transportation which may in any particular case be of much greater importance to the community in which it is erected, as well as to the public at large, and to interstate commerce, than is the free and unobstructed navigation of the river spanned by such bridge or even the right to navigate it at all; and has held that, when the question arises whether a bridge, even without a draw, may be erected over a public navigable stream, in the absence of Congressional interference, it is for the local authorities to determine which is of most importance, the commerce of the bridge or of the river; which shall be given preference, and to what extent one highway shall be subservient to the other. And in passing upon matters of this sort this court has apparently been governed to some extent by consideration of the history of such river and community and other matters of common notoriety pertaining to the subject matter, though the same be "not much set out in the pleadings." Ib. 719.

The City of Cleveland is divided by the Cuyahoga River, with a large population upon either side. A vast multitude of people cross this river continuously every day by means of its bridges, and an enormous commerce is handled by the same bridges, in vehicles, street-cars and railroad trains. The commerce passing above this bridge in ships is of no such importance. Without the aid of draw-bridges either navigation would be almost entirely obstructed or these people and this commerce must cross the river in boats, or upon pontoon bridges which might be swung out of the way to enable a ship to

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pass up or down. Before there were bridges, boats of some character were the only means of crossing. Without the aid of draw-bridges, lift-bridges, pontoons or some form of floating bridges, boats would still be necessary to transport the people and the commerce alluded to across the river, and so many boats or ferries would be required as to amount practically to a complete obstruction to ships or vessels desiring to navigate up or down the river. One instrumentality after another has been devised for the purpose of decreasing the interference and obstruction between these two lines of traffic and commerce, and the draw-bridge is still generally conceded to be the most efficient and safe aid both to the traffic which must cross and the traffic which must pass up and down the river. In this sense we think it may be fairly said that a draw-bridge aids navigation.

But the history of the port of Cleveland shows that the Cuyahoga River was originally little more than a mere creek, shallow and narrow, and not a natural highway of navigation for the class of vessels which have navigated it. The City of Cleveland has from time to time deepened and widened this creek, until it has become an artificial channel of sufficient depth and capacity to float present day shipping; but this would not have been permitted, and there would now be no such channel, but for the aid of the draw-bridges, which unite the highways and railroads on either side and yet permit the use of the channel for navigation. In this sense the draw-bridges which span the Cuyahoga River are not only aids to navigation, they are the essential instrumentalities without the aid of which there would now be no navigation in this river. Indeed, but for these draw-bridges, the Cuyahoga River would doubtless long ago have been covered over by a continuous culvert, sufficient to drain its head-waters, while permitting the erection of buildings and other improvements over it, and navigation at Cleveland would be confined to the outer harbor. Thus this and the other draw-bridges which span this artificial channel aid navigation and naval commerce every time they open for the passage of a ship, in much the same way that a breakwater does, by artificially providing additional harbor space for the navigation of ships.

THE LOCALITY OF THE INJURIES WAS NAVIGABLE WATER. It cannot properly be assumed upon this appeal that our wharf, bridge-pier and protection work were part of the land, merely because several lower court judges have entertained the theory that any bridge and any wharf or pier is necessarily a part of the land. The allegations of our libel must govern in this respect, at present, and we confidently expect that our proof will fully sustain the libel. In *New York vs. Highland*, Fed Cas. No 10,196, the libel alleged "that the libellants were owners of pier 46, East River, in the city of New York; that the pier was within navigable waters from the ocean, and within the flow of tide-water;" and that the respondent's barque, Carville, negligently discharged cargo on such pier whereby it was injured. Exception was taken to the libel on the ground that admiralty had no jurisdiction. Judge Blatchford overruled the exception on the ground that it did not appear by the libel that the

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pier was part of the land, while it was alleged that it was within navigable waters. This ruling was made about seven years after the *Plymouth* decision. It was a necessary inference from the allegations of the libel that this pier, being within navigable waters, and described as "Pier 46, East river," must be supported by the sub-soil of such waters, and that one end of it must touch land; and Judge Blatchford's ruling clearly contemplates that a pier may at one end touch the shore, and yet extend into navigable waters so that, though it be supported by the sub-soil of such waters, it may yet sustain injuries within navigable waters which are the subject of admiralty action.

Paragraphs 8, 11 and 12 of the libel (15, 17) describe the manner in which the vessels occasioned the injuries complained of, and make it apparent, not only that all of these injuries were consummated in or on the waters of the river which were then actually being navigated by these vessels, but also that the injuries to the vessels themselves, as well as the injuries to the structures now complained of, all constituted one continuous series of injuries and one disaster, all caused by the one wrong of the "Reis." It has already been finally adjudicated in consolidated actions in admiralty, instituted by the owners of the injured vessels, that the *Reis* was alone at fault, and that the *Moore* and the *Eads* were not at fault, for this common disaster. The *Wm. E. Reis*, 143 Fed Rep. 1013, affirmed under the same title in 152 Fed. Rep. 673. Each of the injuries to each structure occurred, either while some one of these vessels was in absolute contact with such structure, and at the same time afloat in the same navigable water in which the structure stood, or by reason of the unusual action of the water as it swept under the keels of the *Eads* and *Reis*, and its greatly increased current undermined and carried away portions of the structures underneath the surface of the water. This peculiar action of the water and of the current, occasioned by the damming up of the river when the vessels wedged together, may be likened to the force of suction occasioned by one vessel overtaking and passing another in shallow water and a narrow channel, which is the cause of frequent collisions, and has been recognized by this court as one of the dangerous incidents attending navigation. Thus both elements of the causes of action set forth in the libel are characterized as maritime: the wrong, the proximate cause of the entire disaster, consisted in the faulty and negligent handling of a ship in navigable water, while the intermediate results just preceding the injuries were in part collision and in part the unusual action of navigable water; and the injuries were sustained by structures in navigable waters, and these structures were important adjuncts of and aids to navigation. It appears from the libel that these vessels passed through the open draw of this bridge and that the superstructure could not be swung closed until several days after the disaster (17). Therefore at the time of the disaster no part of the bridge touched land other than the bed of the river. And it also appears from the libel (17) that the damage to the dock was occasioned by the steamer *Moore* colliding with and crushing in its stringers, flooring and piling along its river face. In order to accomplish this

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the vessel must of necessity be in complete contact with these portions of the dock and at the same time navigating the water underneath the dock. There were seven collisions. The *Reis* struck the *Neil,* but she did not break adrift. Then the *Reis* struck the *Moore,* rebounded and struck her a second time, then the *Moore* broke adrift and struck the *Eads,* which also broke adrift. These three vessels passed part way through the bridge, one or more of them colliding with it, and doing part of the damage thereto sued for in this action. Then the *Moore's* stern collided with the dock, crushing it in as above described, and, while she still remained in contact with the dock, the *Reis* again collided with the *Moore,* causing the most serious portion of the latter's damage and forcing the *Moore's* stern further into the dock. The damage sustained by the vessels, other than the Reis, was the principal part of the entire damage done by this disaster, as appears by comparison of the amount claimed in this libel with the amount of the damage to the vessels, as shown by the District court's opinion in the consolidated actions brought by the owners of the injured vessels. *The Wm. E. Reis,* 143 Fed. Rep. 1013. If it can be said that any portion of the various injuries resulting from this common disaster occurred to something which was attached, or which pertained, to land, then we invoke the doctrine approved of in and made in part the basis of the *Blackheath* decision, which is stated at page 366 thereof as follows: "And 'if the libel be founded upon one single continued act, which was principally upon the sea though part was upon land, a prohibition will not go.' Comp. Dig. Adm. F. 5; 1 Roll. Abr. 533, Pl. 18." There is additional precedent for this doctrine. Cokes Littleton, 152, a; *Steele vs. Thatcher,* Fed. Cas. No 13,348; *Plummer vs. Webb,* Fed. Cas. No. 11,233.

Confining ourselves, however, only to the injuries set forth in this libel, we submit that every element of this disaster characterizes it as a maritime tort, within admiralty jurisdicton under the rules and principles heretofore announced by this court; but, if we are not sustained in this position, then our case calls for a construction of the constitutional grant of admiralty jurisdiction.

(2). THE CONSTITUTIONAL GRANT OF ADMIRALTY JURISDICTION SHOULD BE CONSTRUED TO COVER THE CASE MADE IN THIS LIBEL.

We do not, under this point, ask for a reconsideration of any ruling this court has heretofore made, but rather for an interpretation of the Constitutional grant of admiralty jurisdiction with reference to a new subject matter, thus presenting a question not heretofore decided by this court, unless, as contended under our first point, the principles and analogies of the *Plymouth* and *Blackheath* cases are decisive of that question. In the *Plymouth* case and in the other three decisions of this court first above considered, relating to injuries to shore structures, the injuries were sustained by buildings or structures conceded to be located upon dry land, and no claim was made that such injuries were inflicted or consummated in navigable water. They were all mixed cases

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where it was claimed admiralty had jurisdiction merely because the wrong originated on a ship, resulting in injuries to buildings or structures conceded to form a part of the main land. In the *Blackheath* case the court's ruling was confined to a beacon, the jurisdiction was sustained, and no ruling was made which would deny the jurisdiction in the case at bar.

This court has mentioned various considerations by which it has been guided in its interpretation of this grant of power in respect to other subject matters. In the *Lottawanna*, 21 Wall. 558, it was said that "the general system of maritime law, which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended and referred to, when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'. Thus adopted it became the maritime law of the United States, operating uniformly in the whole country." At page 572 of this opinion it was said: "Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist, either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country, and effects only its own merchants or people in their relations to each other. Whereas, in matters affecting strangers or foreigners, the commonly received law of the whole commercial world is more assiduously observed—as in justice it should be." In *Steamer St. Lawrence*, 1 Black 522, 527, speaking of the boundary of our admiralty jurisdiction, it was said: "And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument *and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.*"

It has always been recognized, however, that, as each new state of facts has arisen calling for further construction of this grant, the reason, principle, convenience and common sense involved must be given due consideration. Thus, in explaining the change in conditions which occasioned the overruling of the *Thomas Jefferson* which had confined admiralty jurisdiction to tide-waters, this court in *Jackson vs. Steamboat Magnolia*, 20 How. 296, at page 299, quoted from the *Genessee Chief* case as follows: "There is certainly nothing in the ebb and flow of the tide that makes the water peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And, if a distinction is made on that account, *it is merely arbitrary, without any foundation in reason, and indeed contrary to it.*" On the same page it was said: "The case of the *Thomas Jefferson* (10 Wheaton) and others, which had hastily adopted this arbitrary and, in this country, false test of navigable waters, were necessarily overruled." At page 301, it was further

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said: "So long as the commerce of the country was centered chiefly on the eastern Atlantic ports, where the fresh water rivers were seldom navigable above tide water, no inconvenience arose from the adoption of the insular test of navigable waters." And at page 302 it was said that, after the adoption of the act of 1845, which was intended to confer admiralty jurisdiction over the Great Lakes, "the courts were placed in the position that they must either declare the act of Congress void, and shock the common sense of the people by declaring the lakes not to be navigable waters, or overrule previous decisions which had established an arbitrary distinction, which, when applied to our continent, had no foundation in reason." On the same page it was remarked that, if the tide-water rule had been adhered to, it would have produced great public inconvenience and at the same time would have failed to accomplish one great object of the framers of the Constitution—that is, "perfect equality in the rights and privileges of the citizens of the different States, not only in the laws of the general government, but in the mode of administering them."

And, finally, this court has very recently said, while discussing this constitutional grant in the *Blackheath* case, at page 367: "But a very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand."

We submit that, viewed in the light of any and all of these variously stated considerations and aids to construction, our case should be held to be of admiralty cognizance.

The words of the grant are certainly as broad as they could be made. As said in the *Lottawanna* case, "the general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted was intended and referred to" by the framers of that instrument. To ascertain what that general system of maritime law was, we must consider the general maritime law, (which, so far as relates to jurisdiction and subject matter, does not seem to have differed materially from the maritime law of France and that anciently recognized in England); the later restrictions upon the English admiralty law brought about through the prohibitions of the common law courts; the admiralty jurisdiction of our colonies; and of our commonwealths when the Constitution was adopted. We find that under each of these systems the admiralty courts had most complete jurisdiction both over offenses, and over civil actions for injuries, to property attached either to the bottom soil or to the banks and shores of inland fresh water rivers and creeks. Surely the lawyers and statesmen of this country, at and prior to the adoption of the Constitution, were familiar with the jurisdiction granted to and exercised by the Vice-Admiralty courts of the colonies, and there is strong reason to believe that most of them were familiar with the history of the English admiralty, and, through that source, with the general maritime law.

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THE GENERAL MARITIME LAW. The Maritime Ordinances of France are said to have been of the highest authority, to have been adopted and followed throughout all christian Europe, and to have conformed to the customs of the Mediterranean and to the Roman civil law. The French Ordinance of 1681 provided that the Judges of the Admiralty should take cognizance of *damages done by ships* to the fisheries, either upon the coasts or in navigable rivers * * * * likewise of the ways appointed for hauling up ships coming from the sea * * * of the damages done to the *keys, banks, moles, palisadoes* and other works cast up against the violence of the sea * * * and generally of all crimes and offences committed upon the sea, its ports, harbors and shores. *Benedict's Admiralty*, §§172, 173, 175.

It appears from the opinion in the *Blackheath* case, at page 365, that in England, prior to the curtailment of the jurisdiction occasioned by the writs of prohibition from the King's Bench, "the Admiral's authority was not excluded by attachment even to the main shore. From before the time of Rowghton's Articles, he could hold inquest over nuisances there to navigation and order their abatement."

" Later commissions to the English Admiral gave him jurisdiction "of any cause, business or injury whatsoever had or done in or upon or through the seas, or public rivers, or fresh waters, streams and havens and places subject to overflowing, whatsoever, within the flowing and ebbing of the sea, *upon the shores* whatsoever adjoining to them or either of them, from any the said first bridges whatsoever towards the sea." *Benedict's Admiralty*, §48: *De Lovio vs. Boit*, Fed. Cas. 3776, p. 431.

The Inquisition at Quinborough, held in the year 1376, gave the admiralty jurisdiction over offences against the public good of the Kingdom, relating to "wears, riddles, blind-stakes and water-mills," and also jurisdiction of the offences "of such as spoil the breed of oysters, or drag for oysters and muscles at unreasonable times." *Benedict's Admiralty* §61. One definition of a wear was a dam in a river to stop and raise the water for conducting it to a mill, while it is also defined as being a fence of stakes or twigs, set in a stream for catching fish. A riddle was a sieve for separating coarser from finer material, as gravel from sand. *Webster's Dictionary*. The riddles of that period doubtless stood upon the shores or banks of rivers or waterways. The water-mills undoubtedly stood upon the shores of rivers, and the dragging for oysters and muscles must have occurred upon the sub-soil of rivers or other water-ways.

Godolphin, one of the admiralty judges under Cromwell, and who administered the admiralty under the Acts and Ordinances of 1648, during the Republican government beginning in that year and ending with the Restoration in 1660, in his "View of the Admiral Jurisdiction," 43-48, states that the admiralty had jurisdiction of "all prejudice done to the *banks of navigable rivers, or to docks, wharfs, keys*, or anything whereby shipping may be endangered,

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navigation obstructed, or trade by sea impeded." *Benedict's Admiralty* §107.

This court has said in *Waring vs. Clarke*, 5 Howard at 455, 456, that in 1660, the year that the English Ordinance of 1648 expired by reason of the Restoration, Virginia adopted an act including many of the provisions of this ordinance; and continuing, this court said, through Mr. Justice Wayne: "That ordinance (of 1648) and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the Convention. In its proceedings they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia."

DURING OUR COLONIAL PERIOD the authority and jurisdiction, not only of the Colonial Governors as Vice-Admirals, but of the Vice-Admiralty Judges, were created and evidenced by commissions from the English rulers and their Lord High Admirals. This court has quoted Chief Justice Anthony Stokes to the effect that all the commissions isued to the Vice-Admirals of the colonies in North America were alike, and has said that the jurisdiction given in those commissions was as large as was exercised in the ancient practice in admiralty in England. *Waring vs. Clarke*, 5 Howard, at 454.

The commission granted by William III in the year 1701 to Lord Cornbury, as Governor and Vice-Admiral of the provinces and colonies of New York, Connecticut and East and West New Jersey, conferred jurisdiction "throughout said provinces and colonies * * * and throughout all and every the seashore, public streams, ports, fresh water rivers, creeks and arms as well of the sea as of the rivers and coasts, whatsoever of our said provinces and colonies," * * * "to take cognizance of and proceed in all civil and maritime causes," etc., * * * "and generally, in all and singular all other causes, suits, crimes, offences, excesses, injuries, * * * throughout the places aforesaid, within the maritime jurisdiction of our Vice-Admiralty of our provinces and colonies aforesaid, and the territories depending thereon by sea or water, on the *banks or shores of the same*, howsoever done, committed, perpetrated or happening." *Benedict's Admiralty*, §§124, 126, 127.

And we learn from the same authority that, from the beginning of Queen Mary's reign (1553) to the time of Charles II, all the patents of the office of Lord High Admiral were of the same form and tenor, as stated by Zouch and Selden; and that the commissions to the Colonial Vice-Admirals and Judges were copied from these patents. *Benedict's Admiralty*, §49.

The commissions issued to the Vice-Admiralty Judges of our Colonies differed from those issued to the Colonial Governors, though they were equally full and explicit, and conferred full jurisdiction over the shores of the inland rivers. The commission issued in 1762 to Richard Morris, as Vice-Admiralty Judge of the provinces and colonies of New York, Connecticut and East and West

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Jerseys, expressly granted full power "to take cognizance of and proceed in all causes civil and maritime * * * which do any ways concern suits, * * * for any matter, cause or thing, business or injury whatsoever done or to be done as well in, upon or by the sea or public streams or fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high-water mark, *as upon any of the shores or banks adjoining to them or either of them.*" *Benedict's Admiralty*, §§150, 151.

These Colonial commissions were acted under, in their widest interpretation, during the whole period of our Colonial government, and the actual business of the Vice-Admiralty Courts, as shown by their records, up to the time of the Revolution, shows that their extended jurisdiction was not dormant, but active. *Benedict's Admiralty*, §164.

DURING THE COMMON-WEALTH PERIOD, so far as there was any legislation at all upon this subject, the acts differed from one another. In some of the States admiralty judges were appointed, without defining their jurisdiction. The Pennsylvania Act gave cognizance over all controversies, suits and pleas of maritime jurisdiction, with certain exceptions, providing that the court should "pass sentence and decree according as the maritime law of nations, and the laws of this common-wealth shall require. The New Jersey Act resembled that of Pennsylvania. In 1779, the legislature of Virginia adopted an act creating a Court of Admiralty, to "have jurisdiction of all maritime causes," except capital offences, and to be "governed in their proceedings and decisions by the regulations of the Congress of the United States of America; by the Acts of the General Assembly; by the laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English Courts of Admiralty; and by the laws of nature and nations." *Benedict's Admiralty*, §§166, 170.

There was so little similarity between these various acts that the framers of the Constitution could not well have had them in mind as a unified system, and to the exclusion of the Colonial Admiralty system, under which they had also practiced; and, had they intended to select the jurisdiction provided for in the legislation of any particular commonwealth, they would have so expressed themselves. However, we have been unable to find in any of this legislation or in any precedents of the commonwealth period, anything tending to deny or restrict the full jurisdiction over the shores and banks and bottom soil of rivers which was possessed and fully exercised by the Colonial Vice-Admiralty courts.

Thus it appears that, many centuries prior to the adoption of our Constitution, the English Admiral and the admiralty courts of England and other leading maritime countries exercised jurisdiction over tortious injuries, as well as offences, respecting property which was attached to the bottom soil and to the shores and banks of inland rivers. In England this jurisdiction extended up the rivers "within the flowing and ebbing of the sea." But, as many

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times stated by this court, it was confined to tide waters, as only tide waters were then in fact navigable waters in England, and did not extend above the first bridges because navigation did not extend above them, and these first bridges undoubtedly could not be passed by ships for want of draws. This jurisdiction covered cases involving injuries to structures which we assume must have stood literally upon dry land, such as water mills, with their appurtenant wears for conducting the water to the mills, and the riddles used to separate sand from gravel; and, as said by Godolphin, *supra*, covered injuries to "docks and wharfs." Later, the prohibitions from the King's Bench narrowed this jurisdiction, in order that the common law courts might enjoy the revenue rightfully belonging to the admiralty courts. But, for a similar reason, that the King might acquire the revenues resulting from such litigation in the American colonies, an even broader jurisdiction was given to the Colonial governors as vice-admirals, and to the Colonial Vice-Admiralty courts, by the patents above mentioned, which clearly covered all civil causes arising, and injuries done, upon the banks and shores of public navigable rivers where the tide ebbed and flowed, as well as upon the banks of fresh water rivers and creeks. Whence came the doctrine that physical injury to a structure or property so located was without the admiralty jurisdiction? Clearly, this doctrine sprung from the statutes of 13 Richard II, C. 5, (1389), to the effect that "the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea," etc., and 15 Richard II, C. 3, providing in effect that thenceforth the admiralty should no longer entertain jurisdiction of any manner of pleas or quarrels "arising within the bodies of the counties *as well by land as by water*"—and from the common law construction of these enactments, to the effect that, if a person would attest on oath that he could with the naked eye see from one bank what was done upon the opposite bank of an arm of the sea, then such water was within the body of the county. But all these doctrines were long ago held to be inapplicable in this country. In *Jackson v.s. The Magnolia*, 20 How. 296, at 301, where admiralty jurisdiction over a collision occurring *infra corpus comitatus* was assailed, this court declared that "the admiralty jurisdiction surrendered by the States to the Union had no such bounds, as exercised by themselves, and is clogged with no such conditions in its surrender." No English admiralty court ever declared that the ancient jurisdiction of the admiralty over injuries to structures or property attached to the bottom soil, the banks or shores of inland rivers, had been surrendered or no longer existed. The rule announced by the English common law courts, to the effect that admiralty should no longer exercise jurisdiction within the body of a county, accomplished this result there. This court having so frequently declared and held that this English common law rule, denying admiralty jurisdiction within the body of a county, is not applicable to or in force in this country; we cannot perceive why it should deny admiralty jurisdiction over injuries to the structures de-

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scribed in our libel, none of which properly constitute a part of the land, but on the contrary, stand in navigable water, supported only by its underlying soil.

THE WORDS OF THIS GRANT OF JURISDICTION, CONSIDERED IN CONNECTION WITH THE WHOLE INSTRUMENT, favor our contention. The words are "all cases of admiralty and maritime jurisdiction." The word "all" in an instrument, the language of which is so well chosen and guarded as in this Constitution, is most significant. The language of the grant shows no limitation whatever, such as we find in the grants relating to cases arising under the Constitution, cases between citizens, and cases affecting Ambassadors. The limitations found in these latter grants are carefully expressed, while the grant of admiralty jurisdiction as carefully omits all qualifications. Had the framers of our Constitution had in mind only such cases of a maritime nature as had fallen within the admiralty jurisdiction at any time in England, they might have expressed their idea by the use of the words "all cases of admiralty jurisdiction"; but their intent to make the grant limitless, (within the confines of things by their nature maritime) is evidenced by the further use of the word "maritime", derived from a Latin root and adopted from the civil law. Consideration of the words of the grant convince us that the framers of our Constitution, familiar as they were with the history of admiralty jurisdiction in England, with the long contest between the admiralty courts there and the Court of King's Bench, with the fact that the ancient English jurisdiction was based upon the general maritime law influenced by the civil law, familiar with the commissions to the Colonial Vice-Admiralty courts, knowing that even these commissions did not give so broad a jurisdiction in some respects as had been exercised in other countries under the general maritime law, and realizing as they must that the shipping interests of our country were then only in their infancy and that they could not contemplate and foresee all the changes in condition which must attend the growth and progress of maritime commerce, used this unqualified language, "all cases of admiralty and maritime jurisdiction," for the purpose of enabling this court by interpretation to bring within the admiralty jurisdiction all cases which then had or should thereafter appear to properly belong under that head, regardless of what had theretofore been considered as admiralty or maritime cases in the colonies, in England or elsewhere under the general maritime law. In effect this court has so treated the grant in overruling the tide-water test of jurisdiction.

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THE PURPOSES FOR WHICH ADMIRALTY JURISDICTION WAS GRANTED TO THE FEDERAL GOVERNMENT, and the purposes underlying the very existence of a separate branch of maritime jurisprudence and of a separate court to enforce the same, are stated by one eminent authority as follows: "This jurisdiction was made national because, by the common consent of civilized nations, the maritime transactions on the great highways of commerce should be subjected to the *vera lex, recta ratio*—the equitable principles and rules of natural justice,—which, without the enactment of any legislature, are acknowledged as the general maritime law; and also because the internal as well as external peace of the nation might be involved, and the rights of citizens of the different states might be subjected, not to a general and unbiased tribunal, but to a local, a prejudiced, or a partial one, if the local courts should retain this class of cases." *Benedict's Admiralty*, § 206.

This court has said that one of the objects was "perfect equality in the rights and privileges of the citizens of the different states, not only in the laws of the General Government, but in the mode of administering them." *Jackson vs. Steamboat Magnolia*, 20 How. 296, 302.

In the *Genessee Chief*, 12 How. 443 at 459, this court said: "The principle objection made to the admiralty jurisdiction is the want of the trial by jury. And it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. But experience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not tangled with the niceties and strictness of common law pleadings and proceedings." After mentioning the great enlargement of the admiralty jurisdiction which had then come about in England, it was further said: "And this recent and great enlargement of the admiralty power is strong proof that the want of it has been felt, and that experience has shown its necessity where the interests of an extensive commerce and navigation are concerned."

Jury trial may be required, however, by either party, in admiralty causes arising upon the Lakes and other inland waters of this country.. U. S. Rev. Stat. § 566.

In *Mersey Docks, etc., vs. Gibbs*, L. R. 1 H. L. 122, an action to recover for injuries to a ship and cargo through striking a mud bank while attempting to enter a dock, Lord Chancellor Cranworth said: "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the

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docks, they will be entitled to compensation, and in others they will not, such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed." This language was quoted with apparent approval in *Workman vs. New York City*, 179 U. S. 552 at 560. Similar views concerning actions to recover for supplies and services furnished to ships are expressed in *The Roanoke*, 189 U. S. 185 at page 195.

It seems to us that there are three principal reasons for a separate branch of maritime law and for a separate court or class of courts to administer that law, which are (1) the transitory character of ships, with the consequent necessity that they be impressed with a maritime lien, to secure payment for all beneficial services rendered upon their sole credit, as well as indemnity and satisfaction for all injuries to property which they may wrongfully cause; (2) that navigation is a special and complicated art, the very nature of which requires it to be governed by different laws than those which control other branches of activity, that the right determination of maritime causes depends upon a thorough knowledge of such art and such laws, and that jurors in the short period of their service as such cannot be expected to attain this knowledge; and (3) that navigation and maritime commerce involve the rights and obligations of citizens of different nations, and with us also of different states.

It was recognized by those who framed our constitution that much of our maritime commerce would be carried on by foreign vessels, and that the vessels of one state would trade at the ports of another state. Perfect equality therefore, among those engaged in maritime commerce, not only in their rights and obligations, but in the mode of administering them, requires a separate system of admiralty and maritime law, and a separate class of courts to administer it. And that perfect equality of right and obligation, as well as each of the other purposes above suggested, is violated quite as much by denying admiralty jurisdiction over collision injuries to a wharf or bridge standing in navigable water, while sustaining that jurisdiction over similar damage occasioned by the same collision to a vessel lying in the same portion of the same waterway, as it was by sustaining the jurisdiction over a collision occurring within tide-waters of the Mississippi, while denying it over a collision occurring a few miles further up that river, where the action of the tide could not be observed.

In the trial of the consolidated actions against the steamer Reis, above cited, wherein it was held that she was at fault for the injuries sustained by the other vessels in this same disaster, over forty witnesses were examined, including many expert navigators, who were examined and cross-examined at great length concerning matters pertaining to the handling

of the three ships principally involved and to other matters of navigation, about which the average juror or state court judge naturally has no knowledge, and concerning which they could not acquire sufficient knowledge to enable them to rightly understand and apply the proof and the law which should govern, in such length of time as could be allowed for the trial of such a case. In these respects the proof was practically the same as would be offered in the case of a vessel in motion which had collided with a vessel moored at a wharf. This action will require the same character of proof. Most cases of collisions between vessels and docks or bridges involve the navigation of two or more vessels, as where an overtaking vessel by her suction sheers another into collision with a bridge or wharf, or where meeting vessels fail to understand or to heed signals and collide with each other, one of them being thus thrown into collision with the bridge or dock. Many are caused by negligent towage. To establish the fault and the defense in such cases requires the production of nautical proof, both expert and to the facts, and the application of many rules of the maritime law and Federal statutory enactments, to the proper construction of which an experienced admiralty judge is often obliged to devote much careful study and research; after all which the same process is frequently followed by trial *de novo* in an appellate court, which may reach a different result. The right determination of such cases requires long and patient research and deliberation by tribunals familiar with the art and governing rules of navigation; and the submission of such a cause to a common law court and jury (who do not want to be bothered with such litigation) ordinarily results only in a hasty and ill-advised verdict, followed by proceedings in error through the appellate courts.

CONVENIENCE AND REASON demand that this jurisdiction be sustained, and it seems to us that obvious principles underly the jurisdiction, so far as respects physical injuries to persons or property caused by ships in motion. These principles we have already stated, and there is no reason for confining these principles to ships. They should apply to all property located in navigable water. A ship is no more likely to be injured by a collision than is any other property placed in navigable water in the path of passing craft. Under the limitations of the *Plymouth* rule, to which we still confine our discussion, when a wharf or bridge owner places such property in the path of navigation, he subjects such property to collision damage quite as fully as does the owner of a ship who sends it upon a voyage.

Now, what strange distinction between a ship and a bridge-pier or wharf has caused some of the lower courts to rule that collision damage to the latter class of property is not maritime? Only the common law fiction, that personal prop-

erty firmly attached to land is a part thereof, and therefore passes under a conveyance of the land, though we know that steel and timber do not in fact thus become land. This court has ruled in the *Blackheath* case that this common law criterion does not prevail when the question at issue is, whether the locality of the property is land or water. For the purpose of determining whether the injuries we complain of were consummated on land or in water, we submit there is no sound reason for distinction between the beacon and our wharf, pier and protection piling. But, we go a step further and urge that, whether or not any of these structures be considered as technically a part of the land, the fact remains that those portions of them which were injured were injured in navigable water, and that is all that the *Plymouth* rule requires.

It may also be observed that, since on principle the owner of a bridge or wharf injured by collision is quite as much entitled to the benefit of a maritime lien as is the owner of a ship so injured, and all maritime liens should, as we have already urged, be established and adjudicated upon in admiralty; reason and convenience also require that such wharf or bridge owner shall have the benefit, both of the rules of practice, and of the rules relating to the right and measure of recovery, administered by the admiralty, which differ in many respects from the rules of the common law. In matters of practice admiralty aims to avoid a multiplicity of actions and the incurring of unnecessary costs; its proceedings are more summary than those of the common law, both to the end that offending ships may be promptly seized and held to satisfy their obligations before they may proceed elsewhere, and also that, when so seized, a bond or stipulation may be substituted in their place; and it regards more the substance than the mere form of its proceedings.

In the case at bar, suppose that those in charge of the bridge had, negligently as claimed by the owners of the offending ship, failed to open it, with the result that the ship and the other vessels injured had collided with the bridge span, to the injury of it and of all the vessels. If admiralty has jurisdiction over such injury to the bridge, then its owner might libel the offending ship, or, the owner of this ship having libelled the bridge owner, the latter might by cross-libel *in rem* cause the seizure of the offending ship, the owners of the other three vessels injured in this common disaster would intervene, or file independent libels which would be consolidated with the original action; if the owner of the offending ship desired to limit liability, its petition for such relief would be filed in the same proceeding; if the offending ship was in charge of officers and a crew who were the agents of a charterer rather than of the owners, it could be brought into the proceeding by practice in analogy to that provided for by the 59th General Admiralty rule, and compelled to give bond to

answer the final decree, while the offending ship, or the stipulators on the bond for its release, would still be primarily liable for the claims of the other vessels and of the bridge owner, though the rights of the offending ship owner and of the charterer as between themselves would be adjusted in this proceeding (the *Barnstable*, 181 U. S. 464); the charterer could likewise petition for limitation of liability to the value of his interest in the offending ship; and thus every phase of each party's claims or liability growing out of the common disaster could be worked out and finally adjudicated in the one proceeding. The bridge owner would not have to seek out the owners or charterers of the offending ship, but would proceed against the ship itself. And, concerning the right and measure of recovery, if both the offending ship and the bridge owner were held at fault, there would be an apportionment of damage, as between them, and neither could be held alone responsible for all the injuries to the innocent vessels, as would be the case if one of the two tort feasors were sued in a separate action.

On the other hand, if it be held that admiralty has not jurisdiction of the injury to this bridge and wharf, because that particular part of the damage occasioned by the one disaster cannot be considered a maritme tort, though both wrongs and all of the other injuries occasioned thereby are held to constitute a maritime tort, (an anomaly in itself, we submit), then the owners of the innocent injured vessels may libel the offending ship and the bridge owner, and all of the proceedings above described may be had in the one action, except that the bridge owner may not recover for its injuries in such proceeding. The bridge owner would be a party defendant to the action, and would be required to answer and make satisfaction for its fault in failing to open the bridge, even to the owner of the offending ship, but could not cross-libel for the injuries to the bridge and wharf. It must incur all the cost of making its proof and defending, but this proof and expense would avail it nothing in any other action against the owners of the offending ship. Its remedy would necessarily be at common law against the owners of the offending ship, and this remedy would avail nothing, as at common law its contributory fault would bar it of all right of recovery. But, even if this were not so, yet this common law remedy would be utterly inadequate, even though the offending ship be attached either under the state attachment law or water-craft act, because such attachment would be subject to every lien and incumbrance upon the offending ship. If the offending ship be sold under such attachment the purchaser would take her subject to all such liens and incumbrances. If the offending ship was libelled in admiralty by the owners of the other injured vessels before the bridge owner had attached her in a state court action, the proceeds resulting from the sale of the

ship would be applied first in satisfaction of the damage liens in favor of the injured vessels, growing out of this common disaster, and all other liens and incumbrances, even mortgages would then be paid according to their priority. Even mortgagees could intervene by petitions against the proceeds of the sale, though a vessel mortgage is not a maritime contract and does not create a maritime lien. (*The Lottawanna*, 21 Wall. 558 at 583); but this bridge owner could not participate in any part of such fund, even by petition against the proceeds, as in admiralty "the District Court can marshal the fund in its registry only between lienholders and owners." (*The Edith*, 94 U. S. 518, 419), and attachment under the Ohio state law would not create a lien which would entitle the plaintiff in attachment to participate in the distribution of proceeds in admiralty. *The Alice Strong*, 57 Fed. Rep. 249.

It results that the bridge owner would be left utterly without remedy, except by personal action against the owners of the offending ship, and, if they lived in different parts of Spain, so as to require different suits in different courts of that country, the remedy would be practically useless. If the offending ship be domestic, then the bridge owner's remedy would be by personal action in a common law court, with no right to seize the offending ship, or other property of its owner, until after judgment.

The owners of the other injured vessels would have maritime liens against the offending ship, which would take priority over every other prior lien, while we have seen the bridge owner could have no remedy against the offending ship or its proceeds in admiralty. If the amounts secured by these damage liens, by other maritime liens and by mortgages upon the offending ship should equal or exceed the amount for which she sold in admiralty, and her owners had no other property or resources, then the bridge owner could not recover from any source for its loss.

Again, in admiralty "the ship is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer." *The Barnstable*, 181 U. S. 464, 467; *The Palmyra*, 12 Wheaton, 1, 14; *U. S. vs. Brig Malek Adhel*, 21 How. 210. In the case last cited at page 234, Mr. Justice Story said: "A ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere, within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured thing."

Thus, as we have already suggested upon the authority

of the *Barnstable* case, *supra,* if the offending ship was in charge of agents or servants of a charterer, who happened to be financially irresponsible, this fact would not prevent the owner of property injured by such ship from recovering against the ship itself in an admiralty proceeding *in rem,* because in admiralty the ship is regarded as the real offender, and therefore liable *in rem,* though its owners would not be liable *in personam* for such wrong. But, if such a chartered vessel were to collide with any of the structures named in our libel, and it be held that, because of their attachment to the bed of the river, admiralty has no jurisdiction, the owner of such injured property would be utterly without remedy against the ship or its owners, as at common law he could not hold the owners responsible for the acts of the charterer's servants, and if the charterer was insolvent, there could be no reimbursement.

Upon the same principle of the maritime law, if a municipal fire-boat were to negligently collide with a vessel, while running to a fire, the city would be responsible *in personam* in admiralty for the damage thus occasioned, because it owned and operated such fire-boat. *Workman vs. New York City,* 179 U. S. 552. At common law, however, as recognized in the case last cited, and in a multitude of other authorities, it would be held that the fire-boat was engaged in performing a governmental function, and the city would not be held responsible for the negligence of its agents so engaged. If the jurisdiction for which we contend be not sustained, then, if a fire-boat negligently collides with a little shell of a tug moored tight alongside the wharf described in our libel, and, cutting clear through the tug, also collides with and seriously damages the wharf, all by one impact and on account of a single fault in navigation, the tug owner may recover his full damages in admirlty, but the wharf owner is remitted to the common law, and may in no event recover anything, because at common law the agents of the fire-boat were engaged in performing a governmental function. Many similar illustrations might be given.

In view of all these considerations, of the character which have heretofore aided this court in its constructions of this constitutional grant of admiralty jurisdiction; in view of the jurisdiction exercised under the general maritime law and anciently in England, as well as in this country during the Colonial period, and until the adoption of our Constitution, over the banks, shores and bottom soil of inland rivers and creeks and property located thereon; considering the evident intent of the framers of the constitution, the words of the grant, the purposes of a separate system of maritime law and admiralty courts, and the objects on account of which admiralty jurisdiction was conferred upon the Federal courts, as well as the principles underlying the creation of the mari-

time lien, and the demands of reason and convenience, as we have undertaken to point them out; this grant should be so construed as to confer admiralty jurisdiction over the causes of action contained in our libel. And such a construction does not require this court to violate any ruling it has heretofore made.

(3). EVERY CASE OF PHYSICAL INJURY TO PERSON OR PROPERTY, CAUSED BY THE NEGLIGENT ACT OF A SHIP, WHILE SUCH SHIP IS IN NAVIGABLE WATER, SHOULD BE HELD TO FALL WITHIN THE JURISDICTION OF ADMIRALTY, REGARDLESS OF THE LOCALITY OF THE PERSON OR PROPERTY SO INJURED.

The opinion in the *Blackheath* case contains several statements recognizing that the present locality test is purely arbitrary, and seems to us to warrant the sugestion that this test should be reconsidered. As there said, there seems to be no reason why the fact, that the injured property was afloat (or in or upon navigable water), should have more weight in determining the jurisdiction than the fact that the cause of the injury was; and it seems more arbitrary than rational to treat attachment to the soil as a peremptory bar outweighing the other elements involved in the *Blackheath* case. It is also recognized in this opinion that the constitutional grant of jurisdiction "does not prohibit what convenience and reason demand;" and that this court has never decided that every fixture in the midst of the sea, because affixed to the bottom soil, was without the jurisdiction. As we view the subject, every demand of both reason and convenience, as well as of right and equal justice between the owners of property in any wise relating or incident to navigation or to navigable waters, is opposed to the present rule, though it be not restricted by any supposed qualification that the injured thing must be an instrument of, or aid to, navigation. We have attempted to show under our second point the objects and purposes of a separate branch of admiralty jurisprudence and the underlying reason for the maritime lien, and need not repeat them here. We suggest that they apply with as great force to the case set forth in our libel, (even assuming the bridge pier or wharf to be appurtenant to the land), as to any collision case between two vessels or the case of the Government beacon. When it was declared in the *Plymouth* case that, if the injury be consummated upon land, admiralty had not jurisdiction, we believe the court failed duly to consider the prospect that, as shipping interests increased, as ships doubled and redoubled in size and number, and as our ports came to be lined with vast improvements, such as the present improved fast plants for loading and unloading vessels, costly wharves so constructed as in fact to form a part of the land, and support-

ing valuable store houses, elevators, and other similar structures, every dictate both of reason and of commercial convenience would require that the owners of all such valuable and highly improved adjuncts of naval commerce be protected against the frequent injuries likely to be inflicted upon such property by the much larger class of tonnage, which was then scarcely anticipated. We suggest that no reason can be pointed out why the transient nature of ships should not entitle the owners of such shore property to a maritime lien for injuries done by such ships, and we suggest that an admiralty judge, learned in the art and rules or navigation, should pass upon the careless or reckless navigation of a ship, whether it collides with such a shore structure or with a ship or canal boat lashed tight against such structure and occupying in fact the same water. The English common law reason for holding that a jury of landsmen should pass upon such a case, instead of an admiralty judge who knew something about it, was that admiralty might no longer meddle with things done within the county or upon the shore, because a jury could be found there to try such an issue, while it was absurdly assumed that, for the trial of a thing done upon the sea and outside the body of the county, there was no jury present, though the trial in such latter case in fact took place upon English soil. That objection was early raised against the admiralty jurisdiction in this country, but was dismissed as a fiction unworthy of serious consideration. Yet we know of no better reason to sustain the present locality test. The rule of the *Plymouth* permits admiralty to take jurisdiction of injuries sustained by a stevedore, a mere shore laborer, who is injured on board a vessel while she is not navigating but acting as a floating winter storehouse for boat cargo. No principle of navigation is there involved, and that would be a case peculiarly appropriate for jury trial. Many other similar illustrations might be given of cases in no respect maritime, relating in no way to navigation, which, nevertheless, fall within admiralty jurisdiction under the present rule, all cases peculiarly calling for jury trial.

These and similar considerations brought about such enlargement of the English admiralty jurisdiction, prior to this court's decision of the *Genuessee Chief* case, that it covered torts occurring in navigable waters, although within the body of a county, and although such waters were not affected by the tide. When this court, in the *Genuessee Chief* case, abandoned the tide-water test, and ruled that admiralty had jurisdiction over public navigable waters, it assigned as a reason for such change that "experience in England has proved that a wider range of jurisdiction was necessary for the benefits of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not tangled with the niceties and strictness of common law

pleadings and proceedings." Ten years after the decision of the *Genessee Chief* case, in 1861, further experience with a still partially restricted admiralty jurisdiction impelled the English Parliament to enact that admiralty should have jurisdiction of "any claim for damage done by any ship." Under this enactment it is held that the English admiralty has jurisdiction of an action to recover damage occasioned by a vessel colliding with a dock. *The Uhla*, L. R. 2 Ad. & Ec. 29, note; and of an action for damage to oysters and oyster beds upon the bottom soil of a navigable river, the ancient jurisdiction of the English admiralty over the bottom soil and banks of rivers being thus restored. *The Swift*, (1901) L. R. Prob. 168. We think it may be fairly said that the experience of litigants and admiralty practitioners, in submitting such causes as ours to common law tribunals and juries, has been very unsatisfactory; and that, if our constitutional grant of admiralty jurisdiction is properly susceptible of the construction which we suggest under this point, such a construction of it would meet with strong approval, both among those who have occasion to prosecute and those who must defend such actions. At any rate, the reasons which have influenced so enlightened a body as the English Parliament to adopt the legislation above referred to, after centuries of unduly restricted admiralty jurisdiction, together with the views expressed in the *Blackheath* opinion, seem to warrant reconsideration of this subject by this court, and, as we believe, warrant the adoption of at least the limited rule suggested in the heading of this point, which is not put forward as a rule intended to govern all cases of maritime tort, but merely such cases as fall within its description.

Squarely across the end of an arm of the Cuyahoga River at Cleveland, and in navigable water, stand the gates of a dry-dock. The banks of this waterway on either side are lined with ships in various stages of construction, and repair, with fast plants for the rapid unloading of ore from vessels, and various other adjuncts of navigation, all of which are daily and nightly exposed to injury by the multitude of great ships, almost rivalling in size the larger class of ocean vessels, which pass up and down. This Old River-bed, as it is called, is about 200 feet wide, and most of the vessels navigating it are from 400 to 600 feet in length. Some propel themselves, while others are towed. Self-propelled ships and ships in tow of tugs come and go, and pass each other there almost continuously, and collisions are of frequent occurrence, both between vessels and between vessels and objects on the banks. The fast unloading plants consist of great steel arms or cranes, supported upon the main land, but which are let down over the water of the river when in use. Under the present locality rule, if a ship collides with the gates of the dry-dock, and, crushing them in, knocks a ship under repair off the ways,

the tort is maritime, because the dry-dock is not land. The *Robert W. Parsons,* 191 U. S. 17. Under the same rule, if a ship collides with another ship, thus committing a maritime tort, and is by the blow of such collision thrown into collision with a ship located on the extreme river edge of the bank, or with one of these unloading plants, one of which is an instrument of and the other an aid to navigation, the tort is non-maritime and admiralty has no jurisdiction. We respectfully suggest that no principle or reason, and no requirement to be found in the language or purpose of the constitutional grant of admiralty jurisdiction, can justify such a distinction.

Respectfully submitted by

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